TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 498.

MARGARET FRENCH AND HENRY FRENCH, OLIVER H. DEAN, TRUSTEE FOR W. D. McLEOD, AND WILLIAM D. McLEOD, PLAINTIFFS IN ERROR,

vs.

THE BARBER ASPHALT PAVING COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

FILED DECEMBER 6, 1900.

(17,983.)

3390

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INDEX.

	Original.	Print.
Writ of error	1	1
Citation and service (omitted in printing)	3	—
Transcript from circuit court of Jackson county	4	2
Petition	4	2
Answer of French *et al.* (parts omitted in printing)	15	9
Answer of Dean *et al.*	57	16
Reply	58	16
Judgment entry	59	17
Motion for new trial and in arrest filed and overruled; bill of exceptions signed and filed; bond and affidavit for appeal filed; appeal granted	61	18
Bill of exceptions	62	19
Special tax bill No. 73 (omitted in printing)	63	—
Testimony of John Donnelly	66	20
W. S. Woods	69	21
E. H. Phelps	71	23
John Stevens	73	24

Judd & Detweiler, Printers, Washington, D. C., December 19, 1900.

	Original.	Print
Articles 2 and 6 of Revised Ordinances, Kansas City (omitted in printing)	77	—
Testimony of Henry R. Kasson (omitted in printing)	79	—
E. B. Demarest " " "	79	—
Ordinance to pave Forest avenue from Independence avenue to Twelfth street	80	25
Contract and specifications for paving Forest avenue from Independence avenue to Twelfth street (part omitted in printing)	82	27
Bond for maintenance of asphalt pavement (omitted in printing)	101	—
Defendant's declarations of law	102	33
Motion for new trial	104	34
Motion in arrest of judgment	105	35
Bond for appeal (omitted in printing)	107	—
Affidavit for appeal (" ")	108	—
Circuit clerk's certificate	108	35
Cause argued and submitted	109	36
Judgment	109	36
Opinion	109	36
Petition in error (omitted in printing)	131	—
Assignment of errors	133	50
Appeal bond (omitted in printing)	136	—
Clerk's certificate	137	51
Stipulation as to printing record	138	52

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Missouri, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the supreme court of the State of Missouri, in bank, before you, being the highest court of law and equity of the said State, at the October term thereof, 1900, in which a decision could be had in the said suit between Margaret French and Henry French, Oliver H. Dean, trustee for W. D. McLeod, and William D. McLeod, plaintiffs in error herein (defendants below), and The Barber Asphalt Paving Company, defendant in error herein (plaintiff in the court below), wherein was drawn in question the validity of a statute of the *statute* of Missouri and an authority exercised under the statute of the State of Missouri, on the ground of their being repugnant to the Constitution of the United States, and the decision was in favor of such the validity of said State law, and wherein was drawn in question the construction of a clause of the Constitution of the United States and the decision was against the title, right, privilege, and exemption specially set up and claimed under such clause of the said Constitution, a manifest error hath happened, to the great damage of said Margaret French and Henry French, Oliver H. Dean, trustee for W. D. McLeod, and William D. McLeod, plaintiffs in error, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice be done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within thirty days from the date of the citation herein, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, on this 14th day of November, A. D. 1900.

{ Seal of the United States Circuit Court, Central Division, for the Western District of Missouri. }

H. C. GEISBERG,
Clerk of the United States Circuit Court for the Central
2 *Division of the Western District of Missouri.*

Allowed to operate as a supersedeas by—
JAMES B. GANTT,
Chief Justice of the Supreme Court of the State of Missouri.

Return to Writ.

STATE OF MISSOURI, *sct:*

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, together with all things concerning the same.

In testimony whereof I hereto subscribe my name and affix the seal of said supreme court, at the city of Jefferson, this 26th day of November, A. D. 1900.

Seal of the Supreme
Court of Missouri.

JNO. R. GREEN, *Clerk.*

2½–3½ [Endorsed:] Ready. Case Number, —. Margaret French and Henry French, Oliver H. Dean, trustee, and William D. McLeod, plaintiffs in error, *vs.* The Barber Asphalt Paving Company, defendant in error. Writ of error. Filed Nov. 15, 1900. Jno. R. Green, clerk.

4 In the Supreme Court of Missouri.

STATE OF MISSOURI, *sct:*

Be it remembered that heretofore, to wit, on the 24th day of April, 1900, there was filed in the office of the clerk of the supreme court of the State of Missouri a transcript wherein The Barber Asphalt Paving Company was respondent and Margaret French and others were appellants; which said transcript is in words and figures as follows, to wit:

Be it remembered that on the 23rd day of May, A. D. 1899, there was filed in the office of the clerk of the circuit court of Jackson county, State of Missouri, at Kansas City, a petition in the cause wherein The Barber Asphalt Paving Company is plaintiff and Margaret French *et al.* are defendants. Said petition is in words and figures as follows, to wit:

In the Circuit Court of Jackson County, Missouri, Sitting at Kansas City, October Term, 1899.

THE BARBER ASPHALT PAVING COMPANY, Plaintiff,
vs.
MARGARET FRENCH and HENRY FRENCH, Her Husband; Oliver H. Dean, Trustee for W. D. McLeod, and W. D. McLeod, Defendants. } No. 36276.

Petition.

Plaintiff, for first cause of action against the defendants, states it is a corporation duly created and existing under and by virtue of the laws of the State of West Virginia; that it has duly complied with the laws of the State of Missouri with reference to foreign corporations doing business in said State and is authorized to do

business in the State of Missouri; that Kansas City is a municipal corporation duly created and existing under and by virtue of the laws of the State of Missouri, and as such, by its certain ordinance number 5891, entitled "An ordinance to pave Forest avenue from Independence avenue to Twelfth (12th) street," approved July 17th, 1894, provided for the paving of Forest avenue
5 from Independence avenue to Twelfth (12th) street, in said city; that the board of public works of said city, pursuant to and by virtue of said ordinance and the powers in it vested by law, duly awarded the contract for the work aforesaid to the Barber Asphalt Paving Company, which contract was duly confirmed by the mayor and common council of said city; that the work aforesaid has been done and completed according to the terms of such contract by the Barber Asphalt Paving Company and has been accepted by said city; that after the completion of the work aforesaid the cost thereof was duly assessed and apportioned against the land chargeable therewith, as provided by law, and especially as provided by article IX of the charter of said city, adopted on April the 8th, 1889; that thereafter, to wit, on the 15th day of October, 1894, the said city, acting by and through its board of public works, made out and issued to the plaintiff a certain special tax bill, payable in four equal installments, in part payment of the cost of the work aforesaid, the fourth and last installment of which bill is hereto attached, herewith filed, and made a part of this petition, the contents of which *is* as follows, to wit:

THE STATE OF MISSOURI:

No. 73. Ordinance No. 5891.

Kansas City Special Tax Bill.

Issued on the installment plan.

This certifies that the following-described real estate, situated in the corporate limits of Kansas City, county of Jackson, Missouri, as follows, to wit, lot 12, block H, Ranson & Tally's add. to the city of Kansas, now Kansas City, Mo., has been charged with the sum of three hundred and two (302) dollars and fifty-two (52) cents as a special tax for paving Forest avenue from Independence avenue to Twelfth (12th) street, as provided by ordinance No. 5891 of
6 Kansas City, Missouri, entitled "An ordinance to pave Forest avenue from Independence avenue to Twelfth (12th) street, approved July 17th, 1894." Said work has been completed according to contract by the Barber Asphalt Paving Company, contractor, to whom this special tax bill is issued in part payment therefor, and the sum mentioned has been duly assessed and apportioned against the aforesaid land, being the exact amount chargeable against said land, as provided by law, for its proportion of the cost of such work as a lien against said land for a period of one (1) year after the last installment specified herein shall have become due and payable, and no longer, unless within such year suit shall have been instituted to

collect this tax *tax* bill, and notice of the bringing of such suit shall have been filed with the city treasurer, in which case the lien of this tax bill shall continue until the termination of such suit and until the sale of the property under execution on the judgment establishing the same, and no default in the payment of any previous installment hereinafter mentioned shall operate to diminish the period during which such lien shall continue.

This tax bill is payable in four (4) equal installments of seventy-five (75) dollars and sixty-three (63) cents each, on presentation of the three (3) installment coupons hereto attached at maturity thereof, the fourth and last installment of seventy-five (75) dollars and sixty-three (63) cents being payable on the 31st day of May, 1898, with interest thereon, as herein mentioned, on the surrender and cancellation of this tax bill. This tax bill bears interest from the date of issue at the rate of seven (7) per cent. per annum, and when any installment becomes due and collectible, as herein provided, interest thereon and on all unpaid installments shall be due and collectible to that date. If any installment of this tax bill or interest thereon be not paid when due, then all remaining installments shall become
due and collectible, together with interest thereon, at the rate
7 of ten (10) per cent. per annum, from the date of issue of this
tax bill, less the sum of any interest that may have already been paid on such installments. It is provided, however, that the owner of the property charged with the payment of this tax bill or the owner of any interest therein shall have the privilege of paying same in full at any time before the expiration of thirty (30) days from the date of the issue hereof without interest; and it is provided further that the owner of the property charged with the payment of this tax bill or the owner of any interest therein shall have the privilege of paying this tax bill in full, at any time, by paying the interest thereon to a period of ninety (90) days after the date of such payment, unless such payment is made within less than ninety (90) days of the maturity of the next installment, and then by paying interest thereon to the date when the next installment becomes due and payable.

Given by the authority of the board of public works of Kansas City, Missouri, this 15th day of October, 1894.

PETER H. TIERNAN, *President*,
By JOHN MOLONY.

That the said Barber Asphalt Paving Company receipted to the board of public works for the tax bills issued to it for the doing of the work aforesaid on the 15th day of October, 1894, and less than one year has elapsed since the fourth and last installment of said tax bill became due and payable, and by reason of the premises the said lot 12, block H, Ranson & Tally's add'n, is legally chargeable in favor of the Barber Asphalt Paving Company, on account of the cost of the work aforesaid, with the sum of seventy-five (75) dollars and sixty-three (63) cents with interest on such sum from the 15th day of October, 1894, at the rate of ten per cent. per annum; that plaintiff is now the owner and holder of the fourth and last

installment of the tax bill aforesaid, and that the same is now
8 due and unpaid; that defendants own or claim to own the
land described in the fourth and last installment of said bill
and hereinbefore described or some estate or interest therein.

Wherefore plaintiff prays for a special judgment against the defendants for the sum of seventy-five and .63 (75.63) dollars, with interest as aforesaid, and for the enforcement of the lien of the fourth and last installment of said tax bill against the land aforesaid, as provided by law, and for costs.

Plaintiff, for second cause of action against the defendants, states that it is a corporation duly created and existing under and by virtue of the laws of the State of West Virginia; that it has duly complied with the laws of the State of Missouri with reference to foreign corporations doing business in said State, and is authorized to do business in the State of Missouri; that Kansas City is a municipal corporation, duly created and existing under and by virtue of the laws of the State of Missouri, and as such, by its certain ordinance number 5891, entitled "An ordinance to pave Forest avenue from Independence avenue to Twelfth (12th) street," approved July 17th, 1894, provided for the paving of Forest avenue from Independence avenue to Twelfth (12th) street, in said city; that the board of public works of said city, pursuant to and by virtue of said ordinance and the powers in it vested by law, duly awarded the contract for the work aforesaid to the Barber Asphalt Paving Company, which contract was duly confirmed by the mayor and common council of said city; that the work aforesaid has been done and completed according to the terms of such contract by the Barber Asphalt Paving Company, and has been accepted by said city; that after the completion of the work aforesaid the cost thereof was duly assessed and apportioned against the land chargeable therewith, as provided by law, and especially as provided by article IX of the charter of said city, adopted on April the 8th, 1889; that
thereafter, to wit, on the 15th day of October, 1894, the said
9 city, acting by and through its board of public works, made
out and issued to the plaintiff a certain special tax bill, payable in four equal installments, in part payment of the cost of the work aforesaid, the third installment of which bill is hereto attached, herewith filed, and made a part of this petition, the contents of which *is* as follows, to wit:

Third Installment.

Issued for seventy-five (75) dollars and sixty-three (63) cents, being one-fourth (¼) of special tax bill No. 73, issued on the installment plan to the Barber Asphalt Paving Company, contractor, for paving Forest avenue from Independence avenue to Twelfth (12th) street, as provided in ordinance No. 5891 of the common council of Kansas City, approved July 17th, 1894.

This the third installment coupon is due and collectible on the 31st day of May, 1897, and bears interest, at the rate of seven (7) per cent. per annum, from the date of issue.

Issued by authority of the board of public works this 15th day of October, 1894.

PETER H. TIERNAN, *President*,
By JOHN MOLONY.

That the said Barber Asphalt Paving Company receipted to the board of public works for the tax bills issued to it for the doing of the work aforesaid on the 15th day of October, 1894, and less than one year has elapsed since the fourth and last installment of said tax bill became due and payable, and by reason of the premises lot 12, block H, Ranson & Tally's add., in Kansas City, Mo., is legally chargeable in favor of the Barber Asphalt Paving Company, on account of the cost of work aforesaid, with the sum of seventy-five (75) dollars and sixty-three (63) cents, with interest on such sum from the 15th day of October, 1894, at the rate of ten per cent. per annum; that plaintiff is now the owner and holder of the
10 third installment of the tax bill aforesaid, and that the same
is now due and unpaid; that defendants own or claim to own the land described in the fourth and last installment of said bill and hereinbefore described or some estate or interest therein.

Wherefore plaintiff prays for a special judgment against the defendants for the sum of seventy-five and .63 (75.63) dollars, with interest as aforesaid, and for the enforcement of the lien of the third installment of said tax bill against the land aforesaid, as provided by law, and for costs.

Plaintiff, for third cause of action against the defendants, states that it is a corporation duly created and existing under and by virtue of the laws of the State of West Virginia; that it has duly complied with the laws of the State of Missouri with reference to foreign corporations doing business in said State, and is authorized to do business in the State of Missouri; that Kansas City is a municipal corporation, duly created and existing under and by virtue of the laws of the State of Missouri, and as such, by its certain ordinance number 5891, entitled "An ordinance to pave Forest avenue from Independence avenue to Twelfth (12th) street," approved July 17th, 1894, provided for the paving of Forest avenue from Independence avenue to Twelfth (12th) street, in said city; that the board of public works of said city, pursuant to and by virtue of said ordinance and the powers in it vested by law, duly awarded the contract for the work aforesaid to the Barber Asphalt Paving Company, which contract was duly confirmed by the mayor and common council of said city; that the work aforesaid has been done and completed according to the terms of such contract by the Barber Asphalt Paving Company, and has been accepted by said city; that after the completion of the work aforesaid the cost thereof was duly assessed and apportioned against the land chargeable therewith, as provided by law, and es-
11 pecially as provided by article IX of the charter of said city,
adopted on April the 8th, 1889; that thereafter, to wit, on the 15th day of October, 1894, the said city, acting by and through its board of public works, made out and issued to the plaintiff a certain special tax bill, payable in four equal installments, in part payment

the cost of the work aforesaid, the second installment of which l is hereto attached, herewith filed, and made a part of this petin, the contents of which *is* as follows, to wit:

Second Installment.

Issued for seventy-five (75) dollars and sixty-three (63) cents, being e-fourth (¼) of special tax bill No. 73, issued on the installment an to the Barber Asphalt Paving Company, contractor, for paving rest avenue from Independence avenue to Twelfth (12th) street, as ovided in ordinance No. 5891 of the common council of Kansas ty, approved July 17th, 1894.

This the second installment coupon is due and collectible on the st day of May, 1896, and bears interest, at the rate of seven (7) per nt. per annum, from the date of issue.

Issued by authority of the board of public works this 15th day of ctober, 1894.

PETER H. TIERNAN, *President,*
By JOHN MOLONY.

That the said Barber Asphalt Paving Company receipted to the oard of public works for the tax bills issued to it for the doing of e work aforesaid on the 15th day of October, 1894, and less than ne year has elapsed since the fourth and last installment of said ax bill became due and payable, and by reason of the premises the t 12, block H, Ranson & Tally's add'n, in Kansas City, Mo., s legally chargeable in favor of the Barber Asphalt Paving Comany, on account of the cost of work aforesaid, with the sum of eventy-five (75) dollars and sixty-three (63) cents, with interest on uch sum from the 15th day of October, 1894, at the rate of ten per cent. per annum; that plaintiff is now the owner and holder
12 of the second installment of the tax bill aforesaid, and that the same is now due and unpaid; that defendants own or laim to own the land described in the fourth and last installment of said bill and hereinbefore described or some estate or interest therein.

Wherefore plaintiff prays for a special judgment against the defendants for the sum of seventy-five and .63 (75.63) dollars, with interest, as aforesaid, and for the enforcement of the lien of the second installment of said tax bill against the land aforesaid, as provided by law, and for costs.

Plaintiff, for fourth cause of action against the defendants, states that it is a corporation duly created and existing under and by virtue of the laws of the State of West Virginia; that it has duly complied with the laws of the State of Missouri with reference to foreign corporations doing business in said State, and is authorized to do business in the State of Missouri; that Kansas City is a municipal corporation, duly created and existing under and by virtue of the laws of the State of Missouri, and as such, by its certain ordinance number 5891, entitled "An ordinance to pave Forest avenue from Independence avenue to Twelfth (12th) street," approved July 17th

1894, provided for the paving of Forest avenue from Independence avenue to Twelfth (12th) street, in said city; that the board of public works of said city, pursuant to and by virtue of said ordinance and the powers in it vested by law, duly awarded the contract for the work aforesaid to the Barber Asphalt Paving Company, which contract was duly confirmed by the mayor and common council of said city; that the work aforesaid has been done and completed according to the terms of such contract by the Barber Asphalt Paving Company, and has been accepted by said city; that after the completion of the work aforesaid the cost thereof was duly assessed and apportioned against the land chargeable therewith as pro-
15 vided by law, and especially as provided by article IX of the
charter of said city, adopted on April the 8th, 1889; that thereafter, to wit, on the 15th day of October, 1894, the said city, acting by and through its board of public works, made out and issued to the plaintiff a certain special tax bill, payable in four equal installments, in part payment of the cost of the work aforesaid, the first installment of which bill is hereto attached, herewith filed, and made a part of this petition, the contents of which *is* as follows, to wit:

First Installment.

Issued for seventy-five (75) dollars and sixty-three (63) cents, being one-fourth (¼) of special tax bill No. 73, issued on the installment plan to the Barber Asphalt Paving Company, contractor, for paving Forest avenue from Independence avenue to Twelfth (12th) street, as provided in ordinance No. 5891 of the common council of Kansas City, approved July 17th, 1894.

This the first installment coupon is due and collectible on the 31st day of May, 1895, and bears interest, at the rate of seven (7) per cent. per annum, from the date of issue.

Issued by authority of the board of public works this 15th day of October, 1894.

PETER H. TIERNAN, *President*.
By JOHN MOLONY.

That the said Barber Asphalt Paving Company receipted to the board of public works for the tax bills issued to it for the doing of the work aforesaid on the 15th day of October, 1894, and less than one year has elapsed since the fourth and last installment of said tax bill became due and payable, and by reason of the premises lot 12, block H, Ranson & Tally's add'n, in Kansas City, Mo., is legally chargeable in favor of the Barber Asphalt Paving Company,
14 on account of the cost of work aforesaid, with the sum of
seventy-five dollars and sixty-three (63) cents, with interest on such sum from the 15th day of October, 1894, at the rate of ten per cent. per annum; that plaintiff is now the owner and holder of the first installment of the tax bill aforesaid, and that the same is now due and unpaid; that defendants own or claim to own the land described in the fourth and last installment of said bill and hereinbefore described or some estate or interest therein.

Wherefore plaintiff prays for a special judgment against the defendants for the sum of seventy-five and .63 (75.63) dollars, with interest as aforesaid, and for the enforcement of the lien of the first installment of said tax bill against the land aforesaid, as provided by law, and for costs.

SCARRITT, GRIFFITH & JONES,
Attorneys for Plaintiff.

Be it remembered that on the 3rd day of the regular October term, A. D. 1899, of the circuit court of Jackson county, State of Missouri, at Kansas City, the same being the 11th day of October, A. D. 1899, the following proceedings were had and made of record in the cause entitled:

BARBER ASPHALT PAVING CO.
vs. } No. 36276.
MARGARET FRENCH ET AL.

Defendants Margaret French and Henry French file herein answer.

Said answer is in words and figures as follows, to wit:

15 In the Circuit Court of Jackson County, Missouri, Sitting at Kansas City, April Term, 1900.

THE BARBER ASPHALT PAVING COMPANY, Plaintiff,
vs. } No. 36276.
MARGARET FRENCH, HENRY FRENCH, Her Husband; Oliver H. Dean, Trustee for W. D. McLeod, and W. D. McLeod, Defendants.

Answer.

This day come the defendants Margaret French and Henry French, and for answer to the first count in plaintiff's petition say defendants are now and were at the time this suit was brought the owners in fee and in possession of lot twelve (12), in block H, in Ranson & Tally's addition to the city of Kansas, now Kansas City, Missouri, being the same lot mentioned in plaintiff's petition, and against which plaintiff seeks to enforce special tax bill sued on in the first count of plaintiff's petition. Forest avenue was paved from Independence avenue to Twelfth (12th) street, in Kansas City, by the plaintiff, The Barber Asphalt Paving Company, and on completion of said work the board of public works of Kansas City, Missouri, computed the cost thereof under the contract between Kansas City and the contractor and apportioned the cost thereof according to the frontage of all real estate fronting on Forest avenue from Independence avenue to Twelfth (12th) street, and charged against lot twelve (12), in block H, in Ranson-Tally's addition, its proper proportion of such charge according to the frontage of said lot. The total cost of said work was $28,339.54 *dollars*, and the total frontage on said street paved was 4,683.95 feet. Plaintiff paved said Forest avenue from Independence avenue to Twelfth

(12th) street under and by virtue of a contract in writing
16 between the Barber Asphalt Paving Company, of the one part,
and Kansas City, of the other part, in and by the terms of which said contract said Barber Asphalt Paving Company was to pave said street, and on said contract, by its terms and conditions, Kansas City was not to be liable for said paving or any part thereof or in any way except by the issue of special tax bills against the land and lots fronting on the streets so paved; the amount of the tax bill on each lot was to be according to the frontage on said street. The said contract to pave Forest avenue from Independence avenue to Twelfth (12th) street was authorized by ordinance No. 5891, entitled "An ordinance to pave Forest avenue from Independence avenue to Twelfth (12th) street." There was no other or further authority for said contract. Said ordinance provided that Forest avenue should be paved from Independence avenue to Twelfth, 12th, street according to certain plans and specifications on file in the city engineer's office; that the work should — begun within ten days after a contract therefor bound and took effect, and should be completed within sixty days thereafter, and that the cost of the work should be paid for in special tax bills issued against the lot and lands fronting on Forest avenue from Independence avenue to Twelfth (12th) street, according to law.

There was and is no law authorizing the tax bills sued on to be issued except article 9 of the city charter of Kansas City. In and by the terms of said article 9 and by section 5 of said article 9 the cost of all paving on any street shall be charged as a special tax on the land on both sides of the street according to the frontage thereof. There is no other law authorizing or permitting said tax bills, except said article 9 of the city charter and said section 5 thereof. Said law is contrary to the Constitution of the United States and the 14th amendment thereof, and is
void and of no effect. In and by said law the charter of
17 Kansas City and article 9 thereof, and by section 5 of said
article 9, and by said ordinance, and by said contract, and by said tax bill the State of Missouri deprives defendants of their property without due process of law, contrary to and against the Constitution of the United States and the 14th amendment thereto, which said Constitution of the United States and the 14th amendment thereto defendants invoke as defense to this suit. The tax bill sued on, the ordinance, the contract for the work, and the city charter are all void and of no effect. Wherefore defendants ask for judgment in their favor and for costs.

Defendants, for a second and further defense to the first count in plaintiff's petition, say: Defendants were on July 17th, 1894, and still are the owners in fee and in possession of lot twelve (12), block H, in Ranson & Tally's addition, an addition to the city of Kansas, Missouri, against which the special tax bills sued on were issued. Defendants admit that Kansas City is a municipal corporation duly incorporated according to law. Th*is* defendants admits that the plaintiff is a corporation duly organized under the laws of West Virginia, but defendants den*ies* that plaintiff has complied with the

laws of Missouri with reference to foreign corporations doing business in Missouri. It has not and never had any authority to do business in Missouri. Defendants denie that Kansas City, by its ordinance No. 5891, entitled "An ordinance to pave Forest avenue from Independence avenue to Twelfth (12th) street," approved July 17th, 1894, provided for the paving of Forest avenue from Independence avenue to Twelfth (12th) street, in said city. The common council of Kansas City pretended to pass and in form passed an ordinance, No. 5891, and the mayor of Kansas City pretended to approve and in form approved an ordinance numbered as above, and said pretended ordinance provided as follows: That Forest avenue
from Independence avenue to Twelfth (12th) street shall be
18 paved the full width thereof, exclusive of all sidewalks of
legally established width, and of the spaces legally required
to be paved by the street railway companies operating railways on said street. It was pretended to be enacted by said ordinance, and was in form enacted, that said pavement shall consist of a base of hydraulic cement concrete four inches in thickness; upon this is to be laid a binder of bituminous concrete 1½ inches in thickness, and upon the latter a wearing surface of 1½ inches, prepared from the best quality of pure Trinidad Lake asphalt, and that all of said work should conform in all respects to plans and specifications on file in the office of the city engineer, and defendant, aver that the plans and specifications so referred to in said ordinance and in the office of said engineer were and are a part of said pretended ordinance the same as if copied into it. In and by said pretended ordinance it was pretended to be enacted, and was in form enacted, that the work should be completed in sixty days from the time the contract therefor bound and took effect, and that the work should be paid for in special tax bills against and upon the lands that may be charged with the cost thereof according to law; that the passage of the ordinance and the doing of the work shall not render Kansas City liable to pay for such work or any part thereof, otherwise than by the issue of special tax bills.

Said ordinance pretended to enact, and in form enacted, that the contractor should do all work and furnish all material; that he should maintain and keep said pavement in a perfect state of repair for the period of five years from and after the completion and acceptance of the pavement; that the contractor should give bond with approved security to pay all laborers employed on the work, and to pay for all material used therein; that the contractor should give bond with approved security for the faithful and proper main-
tenance of the pavement for five years after such pavement
19 should be completed and finally accepted; that said bond for
maintenance should provide that within ten days from due
notice from the city engineer at any time the contractor should make good any fault or defect or failure in said pavement, and in the event of his failure to do so, then the city engineer might make or cause to be made such repairs and charge the same to said contractor and his sureties; and it was further provided that the tax bills were to be payable in installments, and the specifications referred to in said

pretended ordinance, and thereby made a part thereof, require the contractor to grade said street to a point seven inches below the then surface thereof, and to roll the ground with a five-ton roller, to excavate and fill up all soft and springy places and make a solid surface; on this rolled foundation shall be placed 4 inches of hydraulic cement concrete, and upon this a bituminous concrete 1½ inches thick, for a binder course, and upon this is required to be laid a wearing surface of Trinidad Lake asphalt cement, 12 to 15 per cent.; sand, 83 to 70 per cent., and pulverized carbonate of lime, 5 to 15 per cent; the gutters near to the curb to receive a coating of hot, pure asphalt. A line of granite or sandstone paving blocks not less than six inches in depth, five (5) to twelve (12) inches in length, and four (4) to seven (7) inches in thickness should be placed along the outside edge of all street railway tracks, and — said specifications so referred to in said ordinance and so made a part of said ordinance, as if copied into it, it was pretended to be provided, and was in form provided, that the contractor was to maintain and keep said pavement in a state of perfect repair for a period of five years from and after the completion and acceptance of the work and the issue of the tax bills to the satisfaction of the city engineer, and said contractor was to maintain and keep an office and agent in Kansas City, Missouri, for five (5) years from and after the date of the issue of
20 the tax bills, and on ten days' notice to this agent the contractor was to repair and make good any defects in said pavement which might occur from any cause at any time within five (5) years after the issue of the tax bills.

Said ordinance further provides that the tax bills were to be issued in installments and were to be issued on completion of the pavement and the price be bid by the contractor for grading the street to the proper depth, for rolling it and making it solid, for furnishing and putting on the concrete, and for the making of the binder course of bituminous concrete, and for making the wearing surface, for furnishing sandstone or granite paving blocks to be laid along the outside edge of the street railway tracks, and for maintaining and keeping said pavement in a state of perfect repair for a period of five (5) years after the completion of said pavement; the contractor was to bid for the entire work a sum not to exceed $2.57 per square yard, and the sum, not to exceed $2.57 per square yard of pavement to be laid, was to include the cost of all the work, labor and materials, and all grading and maintenance and repairs for five (5) years.

Kansas City had no power or authority to pass any ordinance which in whole or in part provided for maintaining and for keeping in perfect repair said street for five (5) years, and said Kansas City had no authority to issue tax bills in installments, and the tax bill sued on was issued under said ordinance as its authority, and is therefore null and void and of no effect, and within 60 days after issue of said pretended tax bill, viz., on the 13th day of December, 1894, defendants, being the owners of lot twelve (12), in block H, in Ranson & Tally's addition to Kansas City, Missouri, filed in the

21 office of the board of public works and city engineer in Kansas City, Mo., their objections to said tax bill, and they objected to the said tax bill on the ground that Kansas City had no authority to pass the ordinance No. 5891, entitled as aforesaid, and that said tax bills are void and without any authority to support them. Wherefore the defendants ask judgment in their favor and for costs.

Defendants, for a third and further defense to the first count in plaintiff's petition, say: Defendants are now and were at the time this suit was brought the owners in fee-simple and in possession of lot twelve (12), in block H, in Ranson & Tally's addition to Kansas City, Missouri, being the same lot mentioned in plaintiff's petition, and against which plaintiff seeks to enforce the special tax bill sued on in the first count of plaintiff's petition. Defendants admit that the plaintiff is a corporation, and that Kansas City is a municipal corporation existing under the laws of the State of Missouri. Defendants admit that Kansas City attempted to enact an ordinance No. 5891, entitled "An ordinance to pave Forest avenue from Independence avenue to Twelfth (12th) street."

The common council of Kansas City attempted to pass and in form did pass and the mayor pretended to approve and in form did approve ordinance No. 5891, but said ordinance did not provide for the paving of Forest avenue from Independence avenue to Twelfth (12th) street, in said city. Said pretended ordinance was wholly null and void from want of authority in Kansas City to enact it.

There was no law authorizing said pretended ordinance. In and by the terms of said pretended ordinance No. 5891, it was pretended to be provided and was in form provided as follows: That Forest avenue from Independence avenue to Twelfth (12th) street should be paved the full width thereof, exclusive of sidewalks, with a pavement to consist of a base of hydraulic cement concrete four inches thick, upon this a binder course of bituminous concrete one 22 and one-half inches thick, and upon this a wearing surface one and one-half inches thick from the best quality of Trinidad Lake asphalt, and that the work embraced in said pretended ordinance should conform in all respects to plans and specifications in the office of the city engineer. It is further provided in said pretended ordinance that the contractor should, in addition to making said pavement, maintain and keep the same in a state of perfect repair for five years from and after the completion and acceptance of said pavement. Said pretended ordinance further provided that the total cost of doing all said work and furnishing all said material and maintaining said pavement in a state of perfect repair for five years from and after the completion of said pavement should not exceed the sum of two $\frac{57}{100}$ dollars per square yard for the surface paved. Said pretended ordinance required the contractor to enter into a contract to make the pavement and maintain and keep it in a state of perfect repair for five years after the completion and acceptance of the pavement without specifying how much was to be paid for maintaining and keeping in repair and how much was to be for original construction and materials and labor.

Neither Kansas City nor the common council of Kansas City had any authority to pass any ordinance to maintain and keep in repair said Forest avenue from Independence avenue to Twelfth (12th) street for a period of five years from the completion and acceptance of the pavement, and the mayor of Kansas City had no authority to approve such ordinance. It could only contract for two years for such purpose of maintaining and keeping in repair. Neither Kansas City nor the common council of Kansas City had any authority to pass the ordinance to pay for the work ordained in special tax bills payable in installments. Neither Kansas City nor the common council of Kansas City nor the mayor of Kansas City
23 had any authority to make out or deliver or issue special tax bills for maintenance and repairs for five years, or any other time, in advance of any repairs being made. Wherefore said ordinance was without any authority and contrary to and against the city charter, and therefore void and of no effect. Within sixty days after the issue of the said pretended tax bills sued on, defendants, being the owners of the lot against which the tax bill sued on was issued and charged and against which it is sought in the petition herein to enforce said special tax bill, filed with the board of public works a written statement of each and all objections to the tax bill sued on, which said statement in writing is in words and figures as follows, viz: Said statement sets up the same objections to the validity of said bills contained in this answer.

There was no other or further ordinance for doing said work or any part thereof. By reason of the facts alleged in this answer said ordinance was void and of no effect, and the tax bill sued on is *void* and of no effect.

Wherefore defendants ask judgment in their favor and for costs.

Defendants, for a fourth and further defense to the 1st count in plaintiff's petition, say defendants are now and have been for ten years prior to this time the owners in fee and in possession of lot twelve (12), in block H, in Ranson & Tally's addition to Kansas City, Missouri, being the lot against which the tax bill sued on in said count was issued. Said tax bill purports to be and was issued for work done and to be done and materials furnished and to be furnished under a contract between Kansas City, of the one part, and the plaintiff, The Barber Asphalt Paving Company, as principal, and Hugh J. McGowan and Joseph W. Mercer, as securities, of the other part. Said contract was void and of no effect. The ordinance
24 required all said work to be done in sixty days, but the contract provided that the engineer might extend the time for the completion of said work, and said contract thereby delegated to the city engineer the power to fix the time for the completion of said contract, all of which was void and rendered the whole contract void. Wherefore defendants ask judgment in their favor and for costs.

Defendants, for a fifth and further defense to the first count in plaintiff's petition, say they are now and have been for ten years last past the owners in fee and in possession of lot twelve, in block H, in Ranson & Tally's addition to the city of Kansas, now Kansas ity, Missouri, being the same lot against which the special tax bill sued on in the first count was issued.

Kansas City, of the one part, and the Barber Asphalt Paving Company, as principal, with Hugh J. McGowan and Joseph W. Mercer, as securities, of the other part, entered into a contract in writing, a copy of which is herewith filed, and in and by the terms of said contract agreed to by Kansas City and by this plaintiff plaintiff was to pave Forest avenue from Independence avenue to Twelfth street in the manner set out in said contract. The street was to be graded and the surplus material hauled away. A hydraulic cement concrete base of four inches in thickness was to be made, and upon this was to be placed a bituminous concrete 1½ inches thick, called a binder course, and upon this binder course was to be made and placed a wearing surface 1½ inches thick, and it was further agreed that the plaintiff was to maintain and keep in perfect repair said pavement for five years after the completion of the pavement and was to keep and maintain in Kansas City, Missouri, an office and an agent, and said plaintiff agreed, on notice being given it, to immediately repair and make good any defects in said pavement which may arise at any time during the five years next succeeding the issue of the tax bills. For doing said work and furnishing said material and for maintaining and keeping said
25–56 pavement in perfect repair for five years after its completion plaintiff was to receive payment in special tax bills only against and upon the adjoining and abutting real estate, and the tax bills were to be issued as soon as the pavement was completed, five years in advance of any repairs being made and five years in advance of any agent and office being selected and maintained, and for said work and material and for said maintenance and repairs and for maintaining and keeping in Kansas City an office and agent said Kansas City agreed to pay in special tax bills the sum of $2.57 per square yard for all the pavement laid, and said price included the cost of constructing said pavement, including all material and labor and the cost of maintaining and keeping the street in a state of perfect repair for five years after the completion of the pavement and the delivery of the tax bills, and said tax bills were to be delivered and made payable in installments. Kansas City had not and never had power to make the special tax bills payable in installments. There was no price agreed on for repairs, but the $2.57 per square yard included the cost of the original pavement and all repairs and maintenance. Kansas City had no power to make a contract to keep and maintain said pavement in a state of perfect repair for five years, and the price of construction is not separated or separable in said contract from the price to be paid for maintenance and repairs. Within sixty days after the issue of this tax bill defendants filed in the board of public works their objection, in writing, to said tax bills, and the objection thereto was that Kansas City had no power to make the contract for paving said street. Said contract exceeded its powers and was prohibited by the charter. Wherefore said tax bill is void and of no effect. Defendants ask judgment in their favor and for costs.

* * * * * * *

57 During the same term, on the 11th day of October, A. D. 1899, the following proceedings were had and made of record in the cause entitled—

BARBER ASPHALT PAVING CO.
vs. } 36276.
MARGARET FRENCH ET AL.

Defendants Oliver H. Dean, trustee for W. D. McLeod, and W. D. McLeod file joint and separate answer.

Said separate answer is in words and figures as follows, to wit:

In the Circuit Court of Jackson County, Missouri, at Kansas City, October Term, 1899.

THE BARBER ASPHALT PAVING COMPANY,
Plaintiff,
vs. } No. 36276. Div. 2.
MARGARET FRENCH ET AL., Defendants.

Separate Answer.

Now come the defendants Oliver H. Dean, trustee for W. D. McLeod, and W. D. McLeod, and for their joint and separate answer to plaintiff's petition and each and every count thereof deny each and every allegation, matter, and thing therein made or contained.

Wherefore said defendants pray for judgment and costs.

WARNER, DEAN & McLEOD,
Attorneys for said Defendants.

58 During the same term, on the 1st day of November, A. D. 1899, the following proceedings were had and made of record in the cause entitled—

BARBER ASPHALT PAVING CO.
vs. } 36276.
MARGARET FRENCH.

By agreement of parties a jury is waived herein.

During the same term, on the 9th day of December, A. D. 1899, the following proceedings were had and made of record in the cause entitled—

BARBER ASPHALT PAVING CO.
vs. } 36276.
MARGARET FRENCH ET AL.

Plaintiff files reply to answer of defendants Margaret French and Henry French.

Said reply is in words and figures as follows, to wit:

In the Circuit Court of Jackson County, Missouri, Sitting at Kansas City, October Term, 1899.

BARBER ASPHALT PAVING COMPANY, Plaintiff. *vs.* MARGARET FRENCH ET AL., Defendants.	No. 36276.

Reply.

Now comes the plaintiff and for its reply to the answer of the defendants Margaret French and Henry French in the above-entitled cause denies each and every allegation of new matter in each and every count of said answer contained. Plaintiff further states that the work or improvement of paving Forest avenue from Independence avenue to 12th street, for which the tax bill sued on in the above-entitled cause was issued in part payment of the cost of the said improvement, greatly enhanced the value of the real
59 estate described in plaintiff's petition, and that said real estate was specially benefited to an amount equal to and largely in excess of the cost of the improvement so assessed against said land, and that the cost and expense of the paving of said Forest avenue has been properly assessed and apportioned among the lots and lands benefitted thereby.

Wherefore plaintiff asks judgment as prayed for in its petition.

SCARRITT, GRIFFITH & JONES,
Attorneys for Plaintiff.

On the — day of the regular April term, A. D. 1900, the same being the 21st day of April, A. D. 1900, the following proceedings were had and made of record in the cause entitled—

THE BARBER ASPHALT PAVING COMPANY, Plaintiff, *vs.* MARGARET FRENCH, HENRY FRENCH, Her Husband; Oliver H. Dean, Trustee for W. D. McLeod, and W. D. McLeod, Defendants.	No. 36276.

Judgment Entry.

Now, on this day, this cause coming on regularly to be heard, comes the plaintiff, by its attorneys, and the defendants Margaret French and Henry French, by their attorneys, and the defendants Oliver H. Dean, trustee for W. D. McLeod, and W. D. McLeod, though having been duly summoned, come not, but make default, and said defendants, Oliver H. Dean, trustee, and W. D. McLeod, by not appearing, are deemed to waive a jury, and, the plaintiff and other defendants hereinbefore mentioned having heretofore expressly waived a jury, this cause is submitted to the court upon the pleadings and the proofs, and the court, being fully advised in the premises, doth find the issues for the plaintiff, and finds that the plaintiff is en-
60 titled to recover of the defendants on the first count of plaintiff's petition the sum of one hundred and seventeen dollars

and thirty-five cents ($117.35), with interest thereon from the date hereof at the rate of ten (10) per cent. per annum, and have a lien for said sum upon the land hereinafter described.

And the court doth further find that the plaintiff is entitled to recover of the defendants on the second count of plaintiff's petition the sum of one hundred and seventeen dollars and thirty-five cents ($117.35), with interest thereon from the date hereof at the rate of ten (10) per cent. per annum, and have a lien for said sum upon the land hereinafter described.

And the court doth further find that the plaintiff is entitled to recover of the defendants on the third count of plaintiff's petition the sum of one hundred and seventeen dollars and thirty-five cents ($117.35), with interest thereon from the date hereof at the rate of ten (10) per cent. per annum, and have a lien for said sum upon the land hereinafter described.

And the court doth further find that the plaintiff is entitled to recover of the defendants on the fourth count of plaintiff's petition the sum of one hundred and seventeen dollars and thirty-five cents ($117.35), with interest thereon from the date hereof at the rate of ten (10) per cent. per annum, and have a lien for said sum upon the land hereinafter described.

Wherefore it is considered, ordered, and adjudged by the court that plaintiff have and recover of the defendants the full sum of four hundred and sixty-nine dollars and forty cents ($469.40), with interest thereon from the date hereof at the rate of ten (10) per cent. per annum, and the costs of this suit, to be made and levied of the following-described real estate, situate within the corporate limits of
Kansas City, county of Jackson, State of Missouri, to wit, lot
61 twelve (12), block H, Ranson & Tally's addition to the city of
Kansas, now Kansas City, Missouri, and that plaintiff have
hereof special execution.

During the same term, on the 23rd day of April, A. D. 1900, the following proceedings were had and made of record in the cause entitled—

BARBER ASPHALT PAVING COMPANY, Plaintiff,
vs.
MARGARET FRENCH ET AL., Defendants.
No. 36276.

Docket Entry.

Now, on this day, April 23rd, 1900, come the defendants Margaret French and Henry French and file their motion for a new trial herein; which motion is, by consent of parties, taken up and submitted to the court and by the court duly considered; thereupon the court doth overrule the same; to which action of the court the defendants at the time duly excepted; thereupon the said Margaret French and Henry French filed their motion in arrest of the judgment herein; which motion is, with the consent of the parties in the cause, taken up and submitted to the court, and the court, having duly considered the same, doth overrule the motion; to which action of the court the said defendants at the time duly excepted; thereupon the said defendants tendered their bill of exceptions in this cause, which is by the court allowed and signed by the judge of this court and made a part of the record in this cause; and thereupon the said Margaret French and Henry French filed their bond and affidavit for appeal, which said bond is approved, and the said defendants are granted an appeal in this cause to the supreme court of Missouri.

62 Said bill of exceptions is in words and figures as follows, to wit:

In the Circuit Court of Jackson County, Missouri, at Kansas City, October Term, 1899.

BARBER ASPHALT PAVING COMPANY, Plaintiff,
vs.
MARGARET FRENCH ET AL., Defendants.
No. 36276.

Be it remembered that on the 14th day of December, 1899, and at said October term of said circuit court, the above-entitled cause coming on to be heard before the court, Honorable James H. Slover, judge, presiding, plaintiff appearing by Messrs. Scarritt, Vaughn, Griffith & Jones, its attorneys, and defendants appearing by Messrs. Ess & Georgen and Leon Block, Esq., their attorneys, the following proceedings were had:

It was admitted and agreed that plaintiff had complied with the law of Missouri with reference to foreign corporations and is and was authorized to do business in this State at the time of the institution of this suit; that John Malony was authorized by the board of public works of Kansas City, Missouri, by resolution duly passed, to sign the name of the president of said board to installment tax bills at the time the tax bills in suit were issued; that the signature to the tax bills sued on is that of Peter H. Tiernan, president of the board of public works of Kansas City, Missouri, signed by John Maloney under said authority.

Plaintiff, to sustain the issue on its part, then offered evidence as follows:

First. The tax bills sued on.

Which said tax bills were objected to by defendants for the reason that upon their face they are void, and there is no law in Missouri to support or enforce them.

63-65 The court overruled this objection; to which ruling defendants at the time duly excepted.

Said tax bills were then admitted in evidence, and are in words and figures as follows, to wit:

* * * * * * *

66 All of the lots abutting on that part of Troost avenue on which the said asphalt pavement was laid, as charged, are, it is admitted, of equal depth from said Forest avenue, and are similarly situated with reference to the said Forest avenue, and the lot here in question is improved and used as a residence property

These facts are admitted subject to the objection of defendants as to their competency and relevancy.

JOHN DONNELLY, called as a witness on the part of the plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. SCARRITT:

Q. Where do you reside?

A. Kansas City.

67 Q. What is your profession?

A. Civil engineer.

Q. How long have you followed that profession?

A. For about thirty-five years.

Q. What official positions have you held in this city?

A. I have been city engineer of Kansas City.

Q. For how long a time?

A. For about ten or twelve years at various times during the last twenty years.

Q. Are you acquainted with Forest avenue from Independence avenue to Twelfth street, and the lots fronting thereon?

A. I am.

Q. How long have you been familiar with that property?

A. Some thirty years.

Q. What is the distance from Independence avenue to Twelfth street?

A. A half mile by the Government survey; a little more than that in fact.

Q. State to the court how the land abutting on the street is subdivided, with reference to Forest avenue and the other improvements.

A. In the platting the lots were all given a frontage on Forest avenue, except at Twelfth street, running back a depth of 150 feet to an alley. In the improvements put up ten years ago the improvements were all made with reference to the frontage on Forest avenue and access to the rear.

Q. State whether all of the lots were platted of equal depth.

A. Yes, sir; those that fronted on the street from the alley south of Twelfth street to Independence avenue.

Q. Have you noted the effect of street paving upon adjacent property during the time of your residence in Kansas City?

A. I have.

Q. You may state to the court whether or not in your opinion all of the lots and lands abutting on Forest avenue, in this city, from Independence avenue to Twelfth street, were specially benefit*t*ed by the paving of that street with asphalt in the year 1894, and referred to in the pleadings in this case.

68 Objected to by defendants as incompetent, irrelevant, and immaterial. Objection overruled.

To this ruling of the court defendants at the time duly excepted.

A. The property was benefit*t*ed by the laying of that pavement.

Mr. Ess: We object to the answer and move to strike it out because there must be a special benefit.

The COURT: Perhaps it was not responsive.

Q. I ask you whether it was specially benefit*t*ed thereby.

A. This land was all specially benefit*t*ed by the putting down of the pavement.

Q. Tell the court your opinion as to the ratio the several lots or tracts of land abutting on the improvement share in such special benefits.

Objected to by defendants as incompetent, irrelevant, and immaterial, because, whether a lot is benefit*t*ed in a greater or less proportion, this court has no power to change the amount of the tax bill.

The COURT: I think it is better to let the upper court get all the information it can. There is no jury here, and I will hear it.

To this ruling of the court defendants at the time duly excepted.

A. I think the ratio of benefit of that pavement sustained by each lot was in proportion to the frontage of the lot.

Q. Do you remember what Forest avenue is called on the recorded plat?

A. Elizabeth street, is my recollection. I have not looked at the plat for some time.

Cross-examination waived.

69 W. S. WOODS, called as a witness on the part of plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. SCARRITT:

Q. How long have you resided in this vicinity?

A. About twenty-three years.

Q. What is your business?

A. Real estate.

Q. How long have you followed that business?

A. About ten years.

Q. Are you acquainted with the value of the property in Kansas City and have you an opinion as to the effect of street improvements on the value of abutting lands?

A. Yes, sir; I know the effect of such improvements.

Q. Are you acquainted with Forest avenue from Independence avenue to Twelfth street? And, if so, state how long you have known it.

A. I have known the street for twenty-three years, or since 1876.

Q. State the general character of the property and the general character of the improvements on the street.

A. Well, Forest avenue has always been looked upon as a nice residence street from the time I came here, twenty-three years ago, up to the present time.

Q. Has it preserved the character of a residence street during all of that time?

A. It has; yes, sir.

Q. You may state whether or not the putting of an asphalt pavement on that part of Forest avenue I have referred to, in the year 1894, as described in the answer in this case, was a special benefit to the several lots or tracts of land abutting upon that part of Forest avenue.

Objected to by defendants as incompetent, irrelevant, and immaterial for the same reasons given before. Objection overruled.
70 To this ruling of the court defendants at the time duly excepted.

A. I think the street has been benefit*t*ed by the asphalt pavement.

Q. Do you think the abutting property has been specially benefit*t*ed?

A. I do.

Q. To what extent have each of the lots, in your opinion, been specially benefit*t*ed?

Objected to by defendants as incompetent, irrelevant, and immaterial, and because he cannot determine that. Objection overruled.
To this ruling of the court defendants at the time duly excepted.

A. Well, if I was asked to place a value on the property before the paving and after the paving, I would say the improvement on the street has benefit*t*ed all of the abutting property from eight to twelve dollars a foot, at the least calculation; that is my judgment in asphalt paving matters where property is located as this is.

Q. Do you know how the land abutting on that street or that part of the street described as subdivided—how the lots have been improved with reference to the street?

Objected to by defendants as incompetent, irrelevant, and immaterial. Objection overruled.
To this ruling of the court defendants at the time duly excepted.

A. If I understand the question, you want to know how the lots have been laid out with reference to the street?

Q. Yes.

A. With the exception of the frontage on Twelfth street, and perhaps, I won't say positively, as to Independence avenue, the lots all front on Forest avenue, which runs north and south.

71 Q. State, if you please, what is your opinion of the ratio of the special benefits sustained by each lot or tract of land abutting on that improvement, compared with one another, by reason of that improvement.

Objected to by defendants as incompetent, irrelevant, and immaterial for the reasons already stated, and because the question calls for a construction of the law. Objection overruled.
To this ruling of the court defendants at the time duly excepted.

Q. If I understand your question correctly, I would say the lots would be benefit*t*ed in proportion to their size. For instance, if you have a twenty-five-foot lot and a fifty-foot lot, the latter would be doubly benefit*t*ed as compared with the former.

Q. When you say they are benefit*t*ed according to their size you mean to refer to their frontage?

A. Yes, sir; to the frontage on Forest avenue.

Q. Do you mean the frontage of each lot?

A. Yes, sir.

Cross-examination waived.

E. H. Phelps, called as a witness on the part of plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. Scarritt:

Q. Where do you reside?

A. Kansas City, Missouri.

Q. How long have you lived here?

A. Nearly eighteen years.

Q. What is your business?

A. Real estate.

Q. How long have you been in that business?

A. Nearly eighteen years in this city.

Q. You have had quite a large experience in buying and selling property here and know the effect upon the value of lands which results from the paving of streets?

A. Yes, sir; I think so.

Q. You have been on numerous condemnation juries where benefits and damages have been passed upon?

A. I have.

72 Q. How long have you been acquainted with Forest avenue and the property abutting thereon from Independence avenue to Twelfth street?

A. Nearly eighteen years.

Q. State, if you please, whether or not the paving of that street with an asphalt pavement in 1894, described in the answer in this case, conferred a special benefit upon the several lots and tracts of land abutting thereon.

Objected to by defendants as incompetent, irrelevant, and immaterial for the reasons already stated. Objection overruled.

To this ruling of the court defendants at the time duly excepted.

A. I think it did and it does.

Q. State, if you please, the extent of that special benefit.

Objected to by defendants as incompetent, irrelevant, and immaterial for the reasons already stated. Objection overruled.

To this ruling of the court defendants at the time duly excepted.

A. O, it is benefit*t*ed to the extent of the cost of the paving and probably more; perhaps in the case you speak of I might say twenty per cent.

Q. You refer to Forest avenue?

A. Yes, sir.

Q. Do I understand you to say that in your opinion every tract of land on that street within the limits designated i*n* specially benefit*t*ed?

Objected to by defendants as incompetent, irrelevant, and immaterial for the reasons stated. Objection overruled.

To this ruling of the court defendants at the time duly excepted.

A. Yes, sir.

Q. State the ratio of benefit which in your opinion each of the several lots or tracts of land bears to the whole benefit—I mean each tract abutting on the improvement.

73 Objected to by defendants as incompetent, irrelevant, and immaterial for the reasons already stated. Objection overruled.

To this ruling of the court defendants at the time duly excepted.

A. The ratio is in proportion to the frontage on the street.

Cross-examination waived.

JOHN STEVENS, called as a witness on the part of plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. SCARRITT:

Q. How long have you resided in this city?

A. Fourteen years.

Q. What is your business?

A. Real estate.

Q. How long have you followed that business?

A. Fourteen years.

Q. Are you familiar with the values of lands in Kansas City and with the effect upon such values which is occasioned by reason of the paving of a street upon which the lots abut?

A. Yes, sir.

Q. How long have you been familiar with Forest avenue from Independence avenue to Twelfth street?

A. For fourteen years.

Q. That is one of the good, substantial residence streets of this city?

A. Yes, sir; one of the best.

Q. State whether or not the construction of an asphalt pavement on that street in the year 1894, as described in the defendants' answer in this case, specially benefit*t*ed each lot and tract of land abutting on the improvement.

Objected to by defendants as incompetent, irrelevant, and immaterial for the reasons already stated.

The court overruled the objection; to which ruling defendants at the time duly excepted.

A. Yes, sir; it did.

Q. To what extent?

Objected to by defendants as incompetent, irrelevant, and immaterial for the reasons already stated. Objection overruled.

74-79 To this ruling of the court defendants at the time duly excepted.

A. Well, more than the cost of the improvement, certainly.

Q. State what ratio of benefit is sustained by each tract of land abutting on the improvement with reference to the other tracts of land abutting on the street.

Objected to by defendants as incompetent, irrelevant, and immaterial for the reasons already stated. Objection overruled.

To this ruling of the court defendants at the time duly excepted.

A. I think they were all benefit*t*ed alike—that is, according to their frontage.

Cross-examination by Mr. Ess:

Q. A hole is benefit*t*ed just as much as a nice lying lot?

A. I do not know of any lots which may be termed "holes" on Forest avenue.

Q. Well, generally they are benefit*t*ed as much?

A. That depends on circumstances.

Q. Well, are they in all cases benefit*t*ed alike—the hole being benefit*t*ed equally with a nice level lot?

A. O, there might be a condition of things where a lot would be forty or fifty feet below the grade of the street and the property worthless. In that case it would not be so much benefit, but in all good property, like Forest avenue or better streets, I think it is greatly benefit*t*ed by the paving.

Plaintiff next offered in evidence article 2 of the Revised Ordinances of Kansas City, 1888; also article 6 of the Revised Ordinances of Kansas City, 1898, which are as follows:

80 * * * * * * *

Plaintiff here rested its case, and thereupon defendants, to sustain the issue on their part, offered evidence as follows, to wit:

An ordinance to pave Forest avenue from Independence avenue to Twelfth (12th) street.

Be it ordained by the common council of Kansas City:

81 SECTION 1. That Forest avenue from Independence avenue to Twelfth (12th) street shall be paved the full width thereof, exclusive of all sidewalks of legally established widths, and of the spaces legally required to be paved by the street railway companies operating street railways across said avenue.

SEC. 2. The pavement shall consist of a base hydraulic cement concrete, four (4) inches in thickness; upon this a binder of bituminous concrete, one and one-half ($1\frac{1}{2}$) inches; a wearing surface of one and one-half ($1\frac{1}{2}$) inches in thickness prepared from the best quality of pure Trinidad Lake asp*ah*lt, and shall conform in all respects to plans and specifications on file in the office of the city engineer.

SECTION 3. The work shall be completed within sixty (60) days from the time a contract therefor binds and takes effect, and shall be paid for in special tax bills against and upon the lands that may be charged with the cost thereof, according to law. Which work the common council deems it necessary to have done. And the common council finds and declares that the resolution declaring the work and improvements herein mentioned to be necessary, stating the kind of paving material proposed to be used, as provided by section 2 of article IX of the charter of said city, has been published as therein required, and that the resident owners of said city who own a majority in front feet of all the lands belonging to such residents fronting on said part of the avenue aforesaid, to be improved, have not filed with the city clerk a remonstrance against the doing of such work, or a petition for the making of such improvement with a different kind of material or in a different manner from that specified in such resolution. And the passage of this ordinance, and the doing of said work shall not render Kansas City liable to pay for such work, or any part thereof, otherwise than by the issue of special tax bills.

SEC. 4. The total cost of the work herein authorized shall
82 not exceed the sum of two and fifty-seven one-hundredths
(2.57) dollars per square yard, and said work shall be executed with a guarantee to maintain and keep the same in a state of perfect repair for a period of five (5) years from and after the completion and acceptance of the same, without further compensation than that provided for in the contract for the first cost of the same, and for which the said special tax bills are issued.

SEC. 5. In addition to sufficient bond guaranteeing the payment of all laborers employed on the work, and for all material used therein, a separate bond shall be executed to Kansas City guaranteeing the faithful and proper maintenance of the pavement for five (5) years after such pavement is completed and finally accepted, which bond shall be in the sum determined by the city engineer, secured with at least two (2) good and sufficient securities approved by the city comptroller, and shall provide*d* that within ten (10) days from due notice from the city engineer the contractors or sureties they will repair and make good to the satisfaction of said city engineer any default, defect or failure in said pavement; and in case the said contractor, or sureties, shall fail to make such repairs, the city engineer shall execute the same and charge the cost to said contractors and sureties. The form of such bond shall be approved by the city counselor.

SEC. 6. The special tax bills to be issued for the work and improvement herein provided for shall be made payable in four (4) equal installments, payable and collectible and in all respects in compliance with the provisions of section 23 of article IX of the charter of said city.

SEC. 7. All ordinances or parts of o*r*dinances in conflict with this ordinance are, in so much as they may conflict with this ordinance, hereby repealed.

83 Passed Jul- 13, 1894. Passed Jul- 13, 1894.
WM. T. JAMISON, PETER H. TIERNAN,
Speaker, Lower House of the Common Council. *President, Upper House of the Common Council.*

Approved July 17th, 1894.
WEBSTER DAVIS, *Mayor.*

Attest:
[SEAL.] F. G. GRAHAM, *City Clerk.*

No. 2450.

Board of public works.

KANSAS CITY, MISSOURI, *July* 10, 1894.

To the honorable common council of Kansas City:

The board of public works in pursuance of the provisions of section 2 of article IX of the charter of Kansas City, Missouri, recommends that this ordinance do pass, and that the improvements therein mentioned be made.

By order of the board of public works.
PETER H. TIERNAN, *President.*

Attest:
[SEAL.] H. P. LANGWORTHY, *Secretary.*

Defendant- also offered in evidence the contract for the paving of the street in question, together with the specifications for the doing of the work and the bond for its faithful performance; which said documentary evidence is as follows, to wit:

Approximate estimate, 10,961 sq. yds.

KANSAS CITY.

1894.

Contract and Specifications for Constructing Asphalt Pavement on Forest Avenue from Independence Avenue to Twelfth (12*th*) *Street.*

This contract, made and entered into this 31st day of July, 1894, by and between the Barber Asphalt Paving Company, as principal, and party of the first part, and Hugh J. McGowan and Joseph 84–89 W. Mercer, as securities, parties of the second part, and Kansas City, party of the third part, witnesseth:

That whereas the said party of the first part is the lowest bidder, for making, under provisions of ordinance No. 5891, entitled, "An ordinance to pave Forest avenue from Independence avenue to Twelfth (12th) street," approved July 17th, 1894, the following city improvements, viz: Constructing and maintaining for a period of five (5) years an asphalt pavement on Forest avenue from Independence avenue to Twelfth (12th) street, for the full width thereof exclusive of all sidewalks of legally established widths, and of the spaces legally required to be paved by the street railway company operating the street railways across the said avenue. The pavement shall consist of a wearing surface of Trinidad Lake asphalt not less than one and one-half ($1\frac{1}{2}$) inches in thickness upon an undercourse of bituminous concrete one and one-half ($1\frac{1}{2}$) inches in thickness, laid upon a foundation of hydraulic cement concrete not less than four (4) inches in thickness, the work to be done according to the specifications herein contained.

Now, therefore, the said party of the first part does hereby agree and bind himself, his heirs, executors and assigns, to furnish all the material and do all the work necessary to perform the work above mentioned, according to the terms of said ordinance No. 5891, and the directions of the city engineer, and in conformity to the specifications hereinafter contained and made a part of this contract, and to the satisfaction and acceptance of the city engineer of Kansas City, and to maintain the same in a state of perfect repair for a period of five (5) years from and after its final completion and acceptance.

Specifications for Constructing and Maintaining for a Period of Five (5) *Years an Asphalt Pavement on Forest Avenue, from Independence Avenue to Twelfth* (12*th*).

* * * * * * *

90

Foundation.

Hydraulic cement concrete.

On a subgrade as above prepared there shall be placed a layer of hydraulic cement concrete of not less than four (4) inches in thickness when tamped. The concrete to be formed and places as follows:

Proportions.

The concrete shall be composed of one (1) part of hydraulic cement, two (2) parts of sand, and five (5) parts of broken stone; these proportions to be established by measurement.

Cement.

The cement shall be fresh, fine ground, hydraulic cement and capable of withstanding a tensile strain of thirty-five (35) pounds per square inch, when mixed pure and after an exposure of thirty (30) minutes in the air and twenty-four (24) hours in water. The cement shall be tested and accepted by the engineer. The contractor shall provide dry storage for the cement, and any condemned cement, or any which may become damaged, shall be immediately removed from the work.

Sand.

The sand shall be clean, coarse, sharp river sand, free from loam or dirt, and shall be screened when deemed necessary by the engineer.

Stone.

The stone shall be hard ledge limestone, broken so as not to exceed two and one-half ($2\frac{1}{2}$) inches in their greatest dimensions. They shall be clean, free from duct or dirt, and shall be wet before being used.

91 Mixing and laying.

The concrete shall be prepared in suitable boxes and shall be formed by first thoroughly mixing the proper proportions of cement and sand together dry, to which only a sufficient amount of clean water shall be added to produce a mortar of proper consustence when thoroughly worked. To this fresh mortar the proper proportion of wet stone shall be added, and the mortar and stone quickly and thoroughly mixed until each stone is completely covered with mortar. The concrete shall be promptly deposited in place, without scattering, and then rammed until the mortar flushes to the surface, which surface shall conform to a plane parallel with and four (4) inches below the finished surface of the pavement. The concrete shall be properly protected until, in the opinion of the engineer it is sufficiently set, and not until such time shall the pavement be laid thereon. Concrete shall not be laid when the temperature is such as, in the opinion of the engineer, would injure the quality of the concrete.

The concrete shall extent close up to all openings, projections, or irregularities, and be finished about the same in a neat and workmanlike manner.

Between the curb lines and any intersecting street or alley the concrete and pavement shall be finished against a white-oak plank three inches (3) thick, twelve (12) inches deep and of such length as the engineer may designate. The upper edges of the plank to be neatly adzed off to conform to the finished surface of the pavement.

When the work joins any pavement already laid the engineer may require the contractor to remove and relay a sufficient amount of the old pavement to form a satisfactory connection of the two pavements.

92 Binder course.

Bituminous concrete.

Upon the base of hydraulic cement concrete there shall be spread a dinder course of bituminous concrete composed of clean broken stone not exceeding — and one-half($1\frac{1}{2}$) inches in their greatest dimensions, and an asphalt cement made as hereinafter specified, the parts to be thoroughly heated and then mixed by machinery in the proportions of not less than fifteen gallons of asphaltic cement to one cubic yard of broken stone.

The mixture shall be spread upon the base with hot irons and rakes and while in a hot and plastic condition shall be rammed and rolled until its forms a compact and thoroughly bonded binder course of a thickness of not less than one and one-half ($1\frac{1}{2}$) inches with an even and uniform surface parallel with and — one-half (1½) inches below the completed surface of the pavement.

Wearing surface.

Upon the foundation thus prepared there shall be placed an asphalt wearing surface of not less than one and one-half (1½) inches in thickness when thoroughly compressed, which shall be manufactured and laid as follows:

The wearing surface shall be composed of:

1st. Refined Trinidad Lake asphaltum.

2nd. Heavy petroleum oil.

3rd. Clean, fine, sand.

4th. Pulverized carbonate of lime.

Samples of any of the materials named, or any of the mixtures made therefrom, shall be furnished the city engineer when required, and he shall also have access to all branches to the work at any time.

Asphaltic cement.

An asphaltic cement shall be prepared by melting and mixing
acceptable quantities of refined asphaltum and heavy petro-
93 leum oil in the proportions, by weight, of one hundred (100)
parts of pure asphalt to fifteen (15) to twenty (20) parts heavy
petroleum oil.

Pavement mixture.

The asphalt wearing surface shall be formed by mixing the materials as above specified in the following proportions:

Asphaltic cement—From twelve (12) to fifteen (15) per cent.

Sand—From eighty-three (83) to seventy (70) per cent.

Pulverized carbonate of lime—From five (5) to fifteen (15) per cent.

The mixture shall be effect- as follows: The asphalt cement and sand shall be heated separately to about three hundred (300) degrees Fa-renheit. The pulverized carbonate of ilme, while cold, shall be mixed with the hot sand in the required proportions, and to this mixture sufficient asphaltic cement, at the required temperature, shall be added, to effect a thoroughly homogeneous mixture.

Manner of laying.

The pavement mixture thus prepared shall be delivered upon the street at a temperature of not less than two hundred and fifty degrees Fa-renheit. It shall then be quickly spread by means of hot iron rakes in such manner as to insure an even and uniform surface, and to such depth that after having received its ultimate compression it shall have a thickness of not less than one and one-half (1½) inches.

The pavement shall be ironed and rolled by hand, after which a small amount of hydraulic cement shall be swept over it, and it will then be thoroughly compressed with a steam roller, the rolling to continue as long as it makes an impression on the surface.

The gutters for a width of twelve inches next the curb shall receive a coating of hot pure asphalt.

There shall be laid along the outside edge of all street railway tracks a line of granite or sandstone paving blocks, not less
94 than six inches in depth, five to twelve inches in length and four to seven inches in thickness.

* * * * * * *

95 & 96 *General Stipulations.*

It is further expressly agreed between the parties hereto that this contract is made subject to the conditions and stipulations which follows:

* * * * * * *

97 10. It is further agreed that the passage of the ordinances hereinbefore referred to, and the doing of the work embraced in this contract without any proper petition to the common
98 council from the real-estate owners to have said work done, shall not render the city liable to pay directly or indirectly for such work, or any part thereof, otherwise than by the issue of special tax bills, and the said first party shall assume all risks as to the validity of such special tax bills and take the same without recourse against Kansas City in any event.

* * * * * * *

15. In consideration of the completion by the said first party of all the work embraced in this contract in conformity with the specifications and stipulations herein contained, Kansas City, party of the third part, hereby agrees to pay to the said first party at the following rate per square yard, viz:

The sum of two (2) dollars and fifty-seven (57) cents.

And the said party of the first part further agrees that he will not be entitled to receive payment for any portion of the afore-
99 said work or materials until the same shall have been fully completed in the manner set forth in this agreement to the satisfaction and acceptance of the city engineer. And that he will then receive pay according to the above schedule of prices, in special tax bills against and upon the lands liable to be charged with the cost thereof, as provided by law, according to the charter and ordinances of said city, and that his receipt therefor shall be in full of all claims against Kansas City on account of said work.

In accordance with the ordinance, for the work herein specified, it is hereby agreed that the special tax bills issued in payment of such work shall be made payable in four (4) equal installments, payable and collectible in the manner provided for in section twenty-three (23) article nine (9) of the charter of Kansas City.

Said parties of the second part hereby guarantee that the said party of the first part will well and truly perform the covenants hereinbefore contained to pay for the work and labor of all laborers and teamsters, teams and wagons, employed on the work, and for all materials used therein, and if the cost of such work and labor

and materials is not paid in full by the said party of the first part, then the said parties of the second part hereby agree to pay for said work, labor and materials, or any part thereof, which shall not be paid by said first party, within ten (10) days after the money for such work, labor and materials becomes due and payable, and this provision shall entitle any and all laborers and teamsters, and owners of teams and wagons, who may do work, and parties who may furnish materials on or for the improvements to be done under this contract, to sue and recover from said second parties, or either of them, the amount due or unpaid to them, or either of them, by said first party; but said second parties shall not be liable on this guarantee on account of the materials used and labor done upon said work beyond the sum of twelve thousand dollars ($12,000)
100 the estimated cost of materials used and labor done upon said work.

The said parties of the second part hereby agree with Kansas City that the said party of the first part will well and faithfully perform each and all of the terms and stipulations in the foregoing contract, to be done, kept and performed on the part of the said first party, but said parties of the second part shall not be liable hereon beyond the sum of —.

In witness whereof, the said parties of the first and second parts have hereunto set their hands and seals respectively, and Kansas City executes this contract by her city engineer.

THE BARBER ASPHALT PAVING COMPANY,
By HENRY R. KASSON,
Attorney-in-fact. [L. S.]
J. W. MERCER. [SEAL.]
KANSAS CITY,
By H. H. FILLEY, *Engineer Thereof.* [SEAL.]

CITY COMPTROLLER'S OFFICE,
KANSAS CITY, MO., *Aug.* 6, 1894.

The sureties and bond aforesaid are hereby approved as sufficient.

JOHN F. SHANNON,
City Comptroller.

CITY COUNSELOR'S OFFICE,
KANSAS CITY, MO., *Aug.* 6, 1894.

The foregoing contract and bond are in due form according to law and are hereby approved.

F. F. ROZELLE,
City Counselor.

CITY CLERK'S OFFICE,
KANSAS CITY, MO., 8, 6, 1894.

The foregoing contract and bond have been this day confirmed by the common council of Kansas City.

Attest: F. G. GRAHAM, *City Clerk.*

101 The plans referred to in and made a part of the foregoing contract indicate that the roadway of Forest avenue to be paved has a uniform width of thirty-six (36) feet, and that the structure of the pavement along the entire extent of the roadway is uniform in character and quantity.

* * * * * * *

102 The foregoing was all the evidence offered in the case. The defendants asked the following declarations of law, viz:

1.

Under the pleadings and evidence plaintiff cannot recover.

2.

The ordinance No. 5891, entitled "An ordinance to pave Forest avenue from Independence avenue to Twelfth street," approved July 17th, 1894, is contrary to and against the charter of Kansas City, and is therefore null and void, and verdict must be for the defendants.

103 3.

The contract offered in evidence for paving Forest avenue is invalid and void and without any authority in Kansas City or her mayor and common council to enact the same.

4.

The contract offered in evidence and read in evidence is a contract to construct the pavement and maintain and keep the street in repair for five years, and is contrary to the charter of Kansas City, and forbidden by it, and is void and of no effect, and your verdict and finding must be for the defendants.

5.

The tax bills sued on are without any authority of any law of this State or of the United States, and are therefore null and void.

6.

The charter of Kansas City purports to authorize the paving of streets and to authorize special tax bills therefor, charging the cost thereof on the abutting property according to the frontage, without reference to any benefits to the property on which the charge is made and the special tax bill levied, and said charter purports to authorize the levy of said special tax notwithstanding the fact that the work for which it is done is a damage to the property and destroys its value.

The law is contrary to and in violation of the fourteenth amendment to the Constitution of the United States.

Said cause was by the court taken under advisement, and on the 21st day of April, 1900, and during said April term of said circuit court, the court refused to give each of said decl-rations of law asked by the defendants, and to this action, order, and ruling of the

court in refusing to give said declarations of law, and to give each of them, defendants at the time duly excepted, and thereupon the court found the issues for plaintiff; to which action of the
104 court defendants then and there excepted, and within four days thereafter, on April 23rd, 1900, defendants filed their motion for a new trial *is* in the words and figures following, viz:

In the Circuit Court of Jackson County, Missouri, Sitting at Kansas City, April Term, 1900.

BARBER ASPHALT PAVING COMPANY
vs.
HENRY N. ESS ET AL.

Motion for New Trial.

Now come the defendants and move the court to set aside the judgment rendered by the court in the above-entitled cause and grant the defendants a new trial of said cause for the following reasons, to wit:

1. Because the judgment is against the law.
2. Because the judgment is against the evidence.
3. Because the judgment is against the law and the evidence.
4. Because the court erred in excluding relevant, competent, and legal evidence offered by the defendants.
5. Because the court erred in admitting incompetent, irrelevant, and illegal evidence on behalf of the plaintiff against the objection of the defendants.
6. Because the court erred in refusing to give each and every one of the instructions asked by the defendants.
7. Because the judgment is otherwise erroneous, illegal, defective, and contrary to law.
8. Because the court erred in not rendering judgment in favor of the defendants and against the plaintiff.

HENRY N. ESS,
Attorney for Defendants.

105 Which said motion, being by consent submitted to the court and argued by counsel, was overruled; to which ruling of the court in overruling said motion for a new trial defendants then and there excepted.

Whereupon defendants on April 23d, 1900, within four days after judgment, filed their motion in arrest of judgment; which said motion is in words and figures following, viz:

In the Circuit Court of Jackson County, Missouri, Sitting at Kansas City, April Term, 1900.

Barber Asphalt Paving Company, Plaintiff,
vs.
—— ——.

Motion in Arrest of Judgment.

Now come the defendants in the above-entitled cause and move the court to set aside and arrest the judgment rendered herein for the following reasons, to wit:

1. Because the judgment upon the record is erroneous.
2. Because the judgment is in favor of the plaintiff, whereas under the pleadings and evidence the same should have been in favor of the defendants.
3. Because the plaintiff's petition does not state facts sufficient to constitute a cause of action against the defendants.
4. Because the judgment is otherwise erroneous, illegal, defective, and contrary to law.

HENRY N. ESS,
Attorney for Defendants.

Which said motion was by the court taken up on its filing, argued, and submitted to the court. The court thereupon overruled the same; to which ruling of the court defendants then and there excepted.

106 & 107 And thereupon, on this 23rd day of April, 1900 the defendants, after the foregoing proceedings were had, presented to the court this their bill of exceptions in this cause; which said bill of exceptions is by the court here allowed and signed, sealed, and made a part of the record, and it is done accordingly.

J. H. SLOVER,
Judge of Division No. 2 of the Circuit Court of Jackson County, Missouri.

* * * * * * *

108 State of Missouri,
County of Jackson, } *ss:*

I, H. M. Stonestreet, clerk of the circuit court of Jackson county, State of Missouri, do hereby certify that the foregoing is a full, true, and complete transcript of all proceedings in the cause wherein Barber Asphalt Paving Company is plaintiff and Margaret French
et al. are defendants, as fully as the same appears of record and
109 on file in my office, and the copy of the bill of exceptions as
furnished by stenographer is inserted herein.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at office, in Kansas City, Missouri, this 21st day of April, A. D. 1900.

[SEAL.]

H. M. STONESTREET, *Clerk,*
By H. D. PAYNE, *D. C.*

And afterwards, to wit, on the 27th day of April, 1900, the following proceedings were had in said cause, viz:

BARBER ASPHALT PAVING CO., Resp.,
vs.
MARGARET FRENCH ET AL., App.

Come now the said parties, by attorneys, and after argument herein submit this cause to the court.

And afterwards, to wit, on the 13th day of November, 1900, the further following proceedings were had in said cause, viz:

BARBER ASPHALT PAVING COMPANY, Respondent, *vs.* MARGARET FRENCH and HENRY FRENCH, Her Husband; Oliver H. Dean, Trustee for W. D. McLeod, and W. D. McLeod, Appellants.	Appeal from Jackson County Circuit Court.

Now, at this day, come again the parties aforesaid, by their respective attorneys, and the court here, being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid in form aforesaid by the said Jackson county circuit court rendered be in all things affirmed and stand in full force and effect, and that the said respondent recover against the said appellants its costs and charges herein expended and have therefor execution. (Opinion filed.)

Which said opinion is in words and figures as follows, to wit:

In the Supreme Court of Missouri, in Banc, April Term, 1900.

BARBER ASPHALT PAVING COMPANY, Respondent,
vs.
MARGARET FRENCH ET AL., Appellants.

110 This suit was instituted in the circuit court of Jackson county, returnable to the October —, 1899, thereof, for the purpose of enforcing the lien of a tax bill issued by Kansas City in part payment of the cost of paving Forest avenue from Independence avenue to Twelfth street with an asphalt pavement. The petition is in the usual form. The defenses relied upon by the defendants, although stated in several different forms, may be resolved into two contentions:

First. That the requirement of the ordinance and contract providing for the work in respect to the guarantee thereof for five years is *ultra vires* on the part of the city and void, and—

Second. That the method of apportioning and charging the cost of the pavement violates the limitation of the Federal Constitution that no State shall deprive any person of his property without due process of law.

The work done consisted of paving with asphaltum the roadway of Forest avenue in the said city, thirty-six (36) feet in width, from Independence avenue to Twelfth street, a distance of one-half of a mile. Forest avenue is one of the oldest and best improved residence streets in Kansas City, and all of the lots abutting thereon front the street and extend back therefrom uniformly to the depth of an ordinary city lot to an alley. The lots are all improved and used for residence purposes, and all of the lots are substantially on the grade of the street as improved, and are similarly situated with respect to the asphalt pavement. The structure of the pavement along its entire extent is uniform in character and quality. There is no showing that there is any difference in the value of any of the lots abutting upon the improvement. The evidence of four witnesses was taken, each of whom testified that each and every lot fronting on that part of the street improved was specially benefited to an amount exceeding the cost of the pavement, and that each of the several lots abutting upon the improvement shared the total benefit sustained by all such lots in the proportion of the frontage of 111 each lot thereon to the total frontage on the improvement of all such lots.

This paving procedure was inaugurated conformably to the requirements of the Kansas City charter by the adoption of a resolution by the common council of this city declaring the work of paving the street to a stated extent, and with a pavement of a defined character, to be necessary, which resolution was first recommended by the board of public works of the city. This resolution was thereupon published for ten days in the newspaper doing the city printing. Thereafter the resident owners of the city, owning a majority of front feet of lands belonging to such residents and fronting on that part of the street to be improved, had the right within thirty days after the first day of the publication of the resolution to file a remonstrance with the city clerk against the proposed improvement, and thereby to divest the common council of the power to make the improvement, and such property-owners had the right, by filing within the same period a petition so to do, to have such street improved with a different kind of material or in a different manner from that specified in such resolution. In this proceeding neither such a remonstrance nor petition was filed, and the common council, upon the recommendation of the board of public works, enacted an ordinance numbered 5891, requiring the construction of the pavement. The charter requires that a contract for such work shall be let to the lowest and best bidder. Thereupon bids for the work were duly advertised for, and, the plaintiff being the lowest and best bidder therefor, a contract was, on the 31st day of July, 1894, entered into between Kansas City and the plaintiff for the construction of said pavement.

The contract expressly provides that the work shall be paid for by the issuance of special tax bills, according to the provisions of the Kansas City charter, and that the city shall not in any event be liable for or on account of the work. The cost of the pavement was apportioned and charged against the lots fronting thereon 112 according to the method prescribed by the charter, which is that the total cost of the work shall be apportioned and charged against the lands abutting thereon according to the frontage of the several lots or tracts of land abutting upon the improvement. The charge against each tract of land is evidenced by a tax bill. The tax bill representing the assessment against each lot is, by the charter, made a lien upon the tract of land against which it is issued and is *prima facie* evidence of the validity of the charge represented by it. Such lien can be enforced only by suit in a court of competent jurisdiction against the owners of the land charged. No personal judgment is authorized to be rendered against the owner of the land. The right is expressly conferred on the owner of reducing the account of the recovery by pleading and proving any mistake or error in the amount of the bill or that the work was not done in a good and workmanlike manner.

The judgment was for the plaintiff for the amount due on the bill and for the enforcement of his lien, from which defendants, having unsuccessfully moved for a new trial and in arrest of judgment, have appealed.

Prior to the decision of the Supreme Court in Norwood *vs.* Baker, 172 U. S., 269, the method adopted in the charter and ordinance of Kansas City of charging the cost of paving Forest avenue against the adjoining lots according to their frontage had been repeatedly authorized by the legislature of Missouri, and such laws had received the sanction of this court in many decisions. St. Louis *v.* Allen, 53 Mo., 44; St. Joseph *v.* Anthony, 30 Mo., 538; Neenan *v.* Smith, 50 Mo., 258; Kiley *v.* Cranor, 57 Mo., 541; Rutherford *v.* Hamilton, 97 Mo., 543; Moberly *v.* Hogan, 131 Mo., 19; Farrer *v.* St. Louis, 80 Mo., 379.

In the last-mentioned case Judge Norton for the court said: "The liability of lots fronting on a street, the paving of which is authorized to be charged with the cost of the work according to their frontage, having been thus so repeatedly asserted, the ques-
113 tion is no longer an open one in this State, and we are relieved from the necessity of examining authorities cited by counsel for plaintiff condemning what is familiarly known as the 'front foot rule.'"

Learned counsel for defendants concede such was the state of the decided law of this State, and that the portion of the Kansas City charter known as the ninth article of the charter, which authorizes the cost of a pavement to be assessed against the lots fronting on the improvement according to their respective frontage, was framed after this court had fully considered and construed similar laws and sustained them against the charge of unconstitutionality, and the assessment now challenged was made under the construction given by this court.

They say: "The question we present is whether under the decision in Norwood *v.* Baker, 172 U. S., 269, the provision of the Kansas City charter under which the tax bill sued on was issued is in violation of the Constitution of the United States, and therefore null and void. We do not and cannot ask this court to reconsider or recast any of its former decisions on this subject. We simply present this controlling decision of the Supreme Court of the United States, and ask that it be applied in this case."

If the facts of this case bring it within the case in judgment in Norwood *v.* Baker this court is bound to follow that decision and will do so whatever views we may hold to the contrary.

In applying the principle of *stare decisis* and controlling authority we will be safe in following that doctrine as announced by the Supreme Court of the United States, whose judgment on the question at bar will be final. In Cohens *v.* The State of Virginia, 6 Wheaton (U. S.), 399, Chief Justice Marshall said:

"The counsel for the defendant in error urge in opposition to this rule of construction some dicta of the court in the case of Marbury *v.* Madison.

114 "It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for judgment. The reason for this maxim is obvious. The question actually before the court is investigated with care and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated." Further on he says, in reference to language used in Marbury *vs.* Madison: "Having such cases only in its view, the court lays down a principle which is generally correct, in terms much broader than the decision, and not only much broader than the reasoning with which that decision is supported, but in some instances contradictory to its principles," and he concludes this point with the announcement that "the general expressions in the case of Marbury *v.* Madison must be understood with the limitations which are given them in this opinion."

In the recent case of Parsons *v.* District — Columbia, 170 U. S., 45, the same court says: "It is trite to say that general principles announced by courts which are perfectly sound expressions of the law under the facts of a particular case may be wholly inapplicable in another and different case, and there is scarcely any department of the law in which it is easier to collect one body of decisions and contrast them with another in apparent conflict than that which deals with the taxing and police powers."

However familiar the facts in the Norwood-Baker case may be, owing to the great interest excited by its promulgation, it will not be amiss to recall its salient features for the purpose of determining its controlling effect in the case at bar.

Mrs. Ellen R. Baker owned a tract of land in the village of Norwood which intercepted Ivanhoe avenue. This avenue was
115 fifty feet wide and had been laid out to the north and south lines of her tract. To make Ivanhoe avenue a continuous street it was necessary to extend it through the Baker tract and acquire a strip thereof fifty feet wide and three hundred feet long.

For this purpose a condemnation proceeding was instituted. The constitution of Ohio provides that where private property is condemned for public use "compensation therefor shall first be made in money, and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner."

Cities and villages in Ohio, as in Missouri, are by statute given power to lay off, establish, open, widen, narrow, straighten, extend, keep in order and repair, and light streets, alleys, public grounds and buildings, wharves, landing places, bridges, and market places within the corporation, and to appropriate private property for the use of the corporation, and each city and village may appropriate, enter upon, and hold real estate within its corporate limits for the following purposes, but no more shall be taken or appropriated than is reasonably necessary for the purpose to which it is to be applied:

"For opening, widening, straightening and extending streets, alleys and avenues, also for obtaining gravel or other material for the improvement of the same and for this purpose the right to appropriate shall not be limited to lands lying within the limits of the corporation." 1 Rev. Stats. Ohio (1890), s. 1692, sub. div. 18 & 33, & section 2232, p. 429 & 430, title, "Cities & villages."

It is further provided by the Statutes of Ohio (1890) that where private property is taken for opening and widening streets, alleys, or other public highways the costs and expenses of the appropriation may be assessed in one of three ways: First, by the council generally upon the public; second, upon abutting, adjacent, or contiguous
116 lots, in proportion to the benefits which may result from the improvement or according to the value of the property assessessed, third, "by the front foot of the property bounding and abutting upon the improvement, as the council by ordinance setting forth specially the lots and lands to be assessed, may determine before the improvement is made." Sect. 2264, R. S. Ohio 1890.

The council of the village of Norwood passed an ordinance which provided for the institution of condemnation proceedings in the probate court, for the ascertainment of the compensation to be paid to Mrs. Baker for the desired strip, and also provided that the compensation paid her and all costs of the condemnation proceedings and all other costs and the interest on the bonds issued, if any, to pay her for her land should be assessed as a benefit to her upon her land abutting on the strip so taken.

It thus appears that the village was invoking at one and the same time the extraordinary power of eminent domain and exercising its power of assessment to pay for the land thus taken.

In the condemnation proceeding proper the jury assessed her compensation at two thousand dollars, and that sum was paid her, and thereupon the village council assessed her with the two thousand dollars and all costs of the condemnation, amounting to $218.58, as benefits to her abutting property.

The result being that the village acquired her property for nothing and charged her $218.58 for having deprived her of it.

Mr. Justice Harlan delivered the opinion of the court. He said: "The particular question presented for consideration involves the validity of an ordinance of that village assessing upon the appellee's land abutting on each side of the new street an amount covering, not simply a sum equal to that paid for the land taken for the street, but in addition the costs and expenses connected with the condemnation proceedings."

The lower court adjudged that the assessment was in violation of
the fourteenth amendment to the Constitution of the United
117 States, and such was the theory of the bill for injunction.
Inter alia Judge Harlan says: "It has been adjudged that
the due process of law prescribed by the (fourteenth) amendment requires compensation to be made to the owner when private property is taken for public use." R'y *v.* Chicago, 166 U. S., 226; Supply Co. *vs.* Brooklyn, 166 N. S., 685.

"The taking of the plaintiff's land for the street was under the power of eminent domain." * * * "But the assessment of the abutting property * * * was an exercise of the power of taxation." "Except for the provision of the constitution of Ohio above quoted, the State could have authorized benefits to be deducted from the actual value of the land taken without violating the constitutional injunction that compensation be made for private property taken for public use, for the benefits received could be properly regarded as compensation *pro tanto* for the property appropriated to public use." But, asks the learned justice, does the exclusion of benefits from the estimate of compensation to be made for the property actually taken for public use authorize the public to charge upon the abutting property the sum paid for it, together with the entire costs incurred in*n* the condemnation proceedings, irrespective of the question whether the property was benefited by the opening of the street? The learned justice then concedes that it is the settled law of the Supreme Court of the United States that "abutting owners may be subjected to special assessments to meet the expenses of opening public highways in front of their property, such assessments resting upon the ground that special burdens may be imposed for special or peculiar benefits accruing from public improvements, citing Mobile County *v.* Kimball, 102 U. S., 691; Railroad *v.* Decatur, 147 U. S., 190; Baumen *v.* Ross, 167 U. S., 548, and the cases there cited. He adds that "according to the weight of judicial authority
the legislature has a large discretion in defining the territory so
deemed specially benefit*t*ed by a public improvement, which
118 may be subjected to special assessment to meet the cost of
such improvements.

He proceeds then to show that the power of the legislature is not unlimited, and that there is a point beyond which the legislative department may not go in exerting its power of taxation consistently with the property rights of the citizen.

He concludes: "In our judgment the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of the excess, a taking, under the guise of taxation, of private property for public use without compensation."

The learned justice, speaking for the majority of the court, expressly disclaimed that his opinion was in conflict with Parson *v.*

Dist. of Columbia, 170 U. S., 45, or Spencer *v.* Merchant, 125 U. S., 345.

From a careful reading of the case, we conclude that the Supreme Court decided three propositions:

First. That "due process of law," as used in the fourteenth amendment to the Federal Constitution, requires compensation to be made to the owner of the land condemned for public use.

Second. That the exaction from the owner of abutting property of the cost of a public improvement in substantial excess of the special benefits received by him is, to the extent of such excess, a taking under the guise of taxation, of private property for public use without compensation.

Third. That in that case the special assessment upon the abutting property of Mrs. Baker, the entire cost of opening the street, including not only the full amount paid her for the strip condemned, but the costs and expenses of the condemnation proceedings, was a taking of her property for public use without compensation; in a word, that while nominally it was the exercise of the taxing power, it was nothing less than confiscation.

Notwithstanding the fact that the discussion took a wide
119 range and much that was said affords ground for the contention of learned counsel that all statutes and ordinances which assess abutting owners with the cost of paving a street according to the front-foot rule, as the charter and ordinance of Kansas City do in the case at bar, are null and void, we are of opinion that it was not the intention of the majority of the court to so hold. We think that Norwood *v.* Baker must be read with a view to the particular facts in judgment in that case, and that it was not the intention of the Supreme Court of the United States to overturn the long line of its own decisions which are in harmony with so many of the decisions of the courts of last resort in the several States of the Union and upon the faith of which vast property rights have accrued.

Indeed, as we understand, the opinion of the court expressly declined to shake the authority of Parsons *v.* The District of Columbia, 170 U. S., 45, in which that court sustained an assessment per front foot upon property abutting upon a street improvement. In that opinion each of the justices who concurred in the majority opinion in Norwood *v.* Baker concurred.

In the Parsons case the Supreme Court adopted the language of Judge Dillon in his work on Municipal Corporation (4th ed.), vol. 2, s. 752, as follows:

"The courts are very generally agreed that the authority to require the property specially benefit*t*ed to bear the expense of local improvements is a branch of the taxing power or included within it.

"Whether the expense of making such improvement shall be paid out of the general treasury or be assessed upon the abutting property or other property specially benefit*t*ed, and if in the latter mode, whether the assessment shall be upon all property found to be benefit*t*ed or alone upon the abutters, according to frontage or according to the area of their lots, is according to the present weight of
120 authority considered to be a question of legislative expediency."

And the court expressly approved the doctrine of Spencer *v.* Merchant, 125 U. S., 345, which case originated in New York. The court of appeals of New York, in an opinion by Judge Finch, held that assessments of abutting property is an exercise of the power of taxation and is vested in the legislature, which determines the amount to be levied and fixes the tax district, and its decision is final. The Supreme Court of the United States in its opinion in the same case said: "The legislature in the exercise of its power of taxation has the right to direct the whole or a part of the expense of a public improvement, such as the laying out, grading, or repairing of a street, to be assessed upon the owners of lands benefitted thereby, and the determination of the territorial districts which should be taxed for a local improvement is within the province of legislative discretion."

In Williams *v.* Eggleston, 170 U. S., 304, the same court said: "Neither can it be doubted that if the State constitution does not prohibit, the legislature, speaking generally, may create a new taxing district, determine what territory shall belong to such district, and what property shall be considered as benefitted by a proposed improvement." To the same effect see Mobile County *v.* Kimball, 102 U. S., 691. In Bauman *v.* Ross, 167 U. S., 548, the court said: "But it is for the legislature and not for the judiciary to determine whether the expense of a public improvement should be borne by the whole State or by the district or neighborhood immediately benefitted."

"The legislature in the exercise of the right of taxation has the authority to direct the whole or such part as it may prescribe of the expense of a public improvement, such as the establishing the widening, the grading, or the repair of a street, to be assessed upon the owners of lands benefitted thereby."

121 "The rule of apportionment among the parcels of land benefitted also rests within the discretion of the legislature and may be directed to be in proportion to the position, the frontage, the area, or the market value of the lands, or in proportion to the benefits as estimated by commissioners."

Some stress is laid upon the distinction between the power of the legislature in the exercise of the taxing power and that of municipalities upon which that power is conferred. But few principles are better settled in the courts of this country than this, that where legislative powers are delegated to a municipal corporation its discretion within the legitimate sphere of its authority is proportionately as wide as is the like discretion possessed by the legislature of the State, "and as free from outside interference, and that discretion is not subject to judicial revision or reversal." Morse *v.* Westport, 136 Mo., 286.

It is true that in many jurisdictions—certainly in this State it is true that municipal acts, whether in the form of ordinances or resolutions, may be impeached for fraud at the instance of persons injured thereby. 1 Dillon Mun Corp. (4th ed.), § 311; Glasgow *v.* St. Louis, 107 Mo., 203. Whereas courts will not inquire into the motives of the legislature.

That the legislature may delegate this power to open, improve,

and pave streets to municipal corporations is no longer an ope
question.

That the charter of Kansas City fully and expressly conferre
this power upon that city will not be questioned; that charter ha
all the dignity and force of a legislative enactment. In the case a
bar there was not the slightest intimation that the ordinance wa
procured by fraud or amounted to arbitrary confiscation, whereas i
the Norwood case the ordinance was arbitrary and oppressive an
could only result in depriving Mrs. Baker of her land for
122 public use without compensation. Under the scheme ther
devised, although Mrs. Baker might have been allowed ever
process of law to recover the value of her land taken, and a hearin
as to how the value of the land taken should be apportioned ove
the benefit district, she could never, unless the district was enlarge
have recovered a cent for her land that was taken, and all additiona
efforts would simply have increased the costs which she was adjudge
to pay, and thus the case properly fell within the rule announced b
Mr. Justice Harlan in Railroad Co. *v.* Chicago, 166 U. S., 226, tha
"the mere form of the proceeding instituted against the owner, eve
if he be admitted to defend, cannot convert the process into du
process of law if the necessary result be to deprive him of his property without compensation."

But in taxing the citizen with his proportionate share of the cos
of a pavement abutting on his lot there is no taking of property fo
public use.

Nor is there anything which smacks of arbitrary or fraudulen
conduct. This method of taxation has passed under the scrutiny o
the courts of this country and has received their approval. Judg
Cooley in his work on Taxation, p. 644, says: "Such a measure of apportionment seems at first blush to be perfectly arbitrary and likel
to operate in some cases with great injustice, but it cannot be denie
that in the case of some improvements frontage is a very reasonabl
measure of benefits—much more than value could be—and perhap
approaching equality as nearly as any other estimate of benefit
made by the judgment of men." Judge Elliott in his book on Road
and Streets, p. 396, says: "The system which leads to the least mischievous and unjust consequences is that which takes into accoun
the entire line *or* the way improved and apportions the expense according to the frontage, for it takes into construction the benefit t
each property-owner that accrues from the improvement of the entir
line of the way and does not impose upon one lot-owner an unjus
portion of the burden."

123 Judge Sharswood, speaking for the supreme court of Pennsylvania in Hammett *v.* Philadelphia, 65 Penn. St., 146, says
"Perhaps no fairer rule can be adopted than the proportion of fee
front, though there must be some inequalities if the lots differ i
situation and depth." Such has been the holding of this cour
throughout its history.

A rule so universally adopted and sustained can hardly be calle
arbitrary or so unjust as to warrant a court to strike down the discretion of the municipality which adopts it.

It is, however, insisted that the Norwood-Baker case does condemn this front-foot rule because it affords no opportunity for a hearing. Still, conceding as we do that there are expressions to this effect in that opinion, it seems so clear to us that the opinion was not predicated upon the want of n*a*otice, and that no amount of notice could have availed to secure justice to Mrs. Baker under the scheme devised, that we do not believe that the Supreme Court intended to lay down the law that a State statute imposing taxes must necessarily and in all cases gives notice and a hearing to the tax-payer before it can be held valid.

We think the decisions of that court are overwhelmingly to the contrary, and we discern no purpose in this opinion to overrule and set aside all of its prior utterances on this subject.

Thus in Parsons *v.* District of Columbia, 170 U. S., the court unanimously said: "In Hagar *v.* Reclamation District, 111 U. S., 701, the distinction between a tax or assessment imposed by a direct exercise of the legislative power calling for no inquiry into the weight of evidence nor for anything in the nature of a judicial examination and a tax or assessment imposed upon property according to its value to be ascertained by assessors upon evidence was pointed out, and it was held that in the former case no notice to the owner is required, but that in the latter case the officers in estimating the value act judicially and notice and an opportunity to be heard are necessary." "In giving the opinion of the court it was
124 said by Mr. Justice Field (p. 709): "Of the different kinds of taxes which the State may impose, there is — vast number of which, from their nature, no notice can be given to the tax-payer, nor would notice be of any possible advantage to him, such as poll taxes, license taxes, and generally specific taxes on things or persons or occupations." In such cases the legislature in authorizing the tax fixes its amount, and that is the end of the matter. If the tax be not paid the property of the delinquent may be sold, and he be thus deprived of his property; yet there can be no question that the proceeding is due process of law, as there is no inquiry into the weight of evidence or other element of a judicial nature and nothing could be changed by hearing the tax-payer. "No right is therefore invaded."

The court further quote Judge Cooley on Taxation with approval to the effect "that the whole cost (of a local improvement) in other cases is levied on lands in the immediate vicinity of the work." "In a constitutional point of view either of these methods is admissible, and one may be sometimes just and *and* another at other times."

"The question is legislative, and, like all legislative questions, may be decided erroneously." The court thus approves Judge Dillon's text, "Mun. Corp., vol. 2, § 752," wherein the learned author says: "Whether the assessment shall be upon all property found to be benefit*t*ed or alone upon the abutters, according to frontage to area*r* of their lots, is, according to the present weight of authority, considered to be a question of legislative expediency," and, in Norwood *v.* Baker, Parson *v.* Columbia is expressly approved by Mr. Justice Harlan on the ground that it was done under an act of Congress

establishing a comprehensive system for the District. From the reasoning of the learned justice it is hard to escape the conclusion that he regarded the fact that the entire cost of the land taken and all the costs of the condemnation *was* assessed upon Mrs.
125 Baker's land as peculiar to that case, and that a different rule would govern if the assessment per front foot had been levied under a general or comprehensive system for betterments, as was the case in Parsons *v.* Columbia, and which clearly exists under the charter and ordinance of Kansas City which provide a comprehensive system for the paving of all the streets of said city and an assessment per front foot upon all abutting property to pay therefor. It seems indisputable that if no inquiry into benefits was required in the Parsons case, and that act was constitutional, neither can the charter and ordinance of Kansas City which also provide a comprehensive system of improvement be held unconstitutional. In neither case is there any inquiry as to benefits nor is the tax levied according to actual benefit, but both alike rest upon the conclusive presumption indulged by Congress in the one case, and the charter in the other, that such an improvement is a benefit to the abutting property. Not only is this true, but the Supreme Court of the United States is solemnly committed to the doctrine that if the assessment actually exceeds the cost of the work it would not vitiate or annul the assessment. Parsons *v.* Columbia, 170 U. S., loc. cit., 5657; Leominsted *v.* Conant, 139 Mass., 384; Hyde Park *v.* Spenver, 118 Ill., 446.

Whether there is really a distinction between the Parsons case and the Norwood-Baker if the fact of the taking of Mrs. Baker's land without compensation be dissociated from the latter, we will not now discuss, but accepting the whole of the Norwood case, its approval of the Parson case, as well as the statement that the front-foot rule excluded an inquiry into benefits, we are of opinion that the Supreme Court of the United States will not condemn the assessment in the case at bar, because it falls clearly within the doctrine of the Parsons case and the construction placed on that case in the Norwood case, and because no court has more emphatically determined that an assessment by the front-foot rule is an
126 exercise of the taxing power and is a legislative function with which the courts have no power to interfere and will not do so. Certainly it is true that until the decision in the Norwood-Baker case, the decisions of the Supreme Court hold that the fourteenth amendment to the Constitution of the United States does not prohibit assessments on real estate in excess of special benefits, or by methods other than according to special benefits.

In the case of Davidson *vs.* New Orleans, 96 U. S., 97, the estate of John Davidson was assessed about $50,000 for draining certain swamp lands in the State of Louisiana. The assessment was levied according to the superficial area or square fee- of land within the drainage district; that in each square foot was taxed as much as every other square foot in the district.

No inquiry was had into benefits and the assessment was not according to benefits. It was even agreed that no drainage was done on Davidson's land, and that a part of his land needed no drainage, having already been drained.

The question was squarely raised and presented whether the fourteenth amendment prohibited such an assessment. Justice Miller wrote the opinion, in which all the justices concurred, and held that the Supreme Court of the *the* United States had no jurisdiction of the case, because the fourteenth amendment was not violated; that that class of cases did not fall within the provisions of the amendment. In the course of his opinion the learned judge says; "It is also said that part of the property of plaintiff which was assessed is not benefit*t*ed by the improvement. This is a matter of detail with which this court cannot interfere if it were clearly so; but it is hard to fix a limit within those two parishes where property would not be benefit*t*ed by the removal of the swamps and marshes which are within their bounds."

127 At that time it is clear that the whole court held that the fact that an assessment was for an improvement which in fact was no benefit to the property-owner did not bring the case within the fourteenth amendment, and it would be hard to conceive of a harder case.

Subsequently in Spencer *v.* Merchant, 125 U. S., 245, Mr. Justice Gray said: "In Davidson *v.* New Orleans it was held that if the work was one which the State had authority to do and pay for by assessments on the property benefit*t*ed, objections that the sum raised was ex*h*orbitant or that part of the property assessed was not benefit*t*ed presented no question under the fourteenth amendment to the Constitution upon which this court could review the decision of the State court."

And in Watson *v.* Nevin, 128 U. S., 578, Chief Justice Fuller said in reference to the Davidson case: "And the conclusion was reached that neither the corporate agency by which the work is done,—the excessive price which the statute allows therefor, nor the relative importance of the work to the value of the land assessed, nor the fact that the assessment is made before the work is done, nor that the assessment is unequal as regards the benefits conferred, nor that personal judgments are rendered for the amount assessed are matters in which the State authorities are controlled by the Federal Constitution. So the determination of the taxing district and the manner of the apportionment are all within the legislative power." Spencer *v.* Merchant, 125 U. S., 345; Stanley *v.* Supervisors, 121 U. S., 535; Mobile *v.* Kimbell, 102 U. S., 691; Hagar *v.* Reclamation Dist., 111 U. S., 701; United States *v.* Memphis, 97 U. S., 284; Laramie Co. *v.* Albany Co., 92 U. S., 307.

"And whenever the law operates alike on all persons and property similarly situated equal protection cannot be said to be denied." Wurts *v.* Hoagland, 114 U. S., 606; R. R. *v.* Richmond, 96 U. S., 521.

128 In Watson *vs.* Nevin, the assessment for the construction of a street was apportioned upon abutting land acording to the number of square feet. No inquiry could have been made as to benefits any more than in the Norwood case, and yet the court ruled it fell within the Davidson case and it had no jurisdiction.

Finally, in Gallbrook Irrigation District *v.* Bardley, 164 U. S., 112, an ad valorem assessment upon all the land within the district was held not contrary to the fourteenth amendment.

The point was specifically made that the assessment was not made in accordance with and in proportion to the benefits conferred by the improvement and land which could not be benefitted was placed in a district to be taxed to pay for the improvement which would benefit others.

The importance of the case is suggested by the great array of eminent counsel on both sides.

Mr. Justice Peckham delivered the opinion. Among other things he said: "As was said by Mr. Justice Miller in Davidson *v.* New Orleans, where the objection was made that part of the property was not in fact benefitted, this is a matter of detail with which this court cannot interfere if it were clearly so, but it is hard to fix a limit within these two parishes where property would not be benefitted by the removal of the swamps and marshes which are within their bounds." To the same effect, Spencer *v.* Merchant, 125 U. S., 345; Lent *v.* Tillson, 140 U. S., 316–333. In regard to the matters thus far discussed, we see no valid objection to the act in question. Again, he says: "The fourth objection, and also the objection above alluded to as the final one, may be discussed, together as they practically cover the same principle. It is insisted that the basis of the assessment upon the lands benefitted for the cost of the construction of the works is not in accordance with and in proportion to the benefits conferred by the improvement, and therefore 129 there is a violation of the constitutional amendment referred to and a taking of the property of the citizen without due process of law. Although there is a marked distinction between an assessment for a local improvement and the levy of a general tax, yet the former is still the exercise of the same power as the latter, both having their source in the sovereign power of taxation."

And again: "We do not discover and our attention has not been called to any case in this court where such an assessment has been held to violate any provision of the Federal Constitution. If it do not, this court can grant no relief."

It is in view of this unbroken chain of authority, this unanimous declaration of the Supreme Court that the fourteenth amendment to the Federal Constitution does not prohibit assessments on real estate for local improvements in excess of special benefits or by methods other than according to the amount of the benefits, and the failure of that court to criticise or overrule any of said decisions that we say that in a case like the one at bar, involving only an assessment or no question of taking private property for public use without compensation, there is no Federal question, and that the Norwood-Baker case does not apply to such a case and does not require that we should overrule the long line of cases decided by this court which sustains the front-foot rule, and that until that court in a case like this shall reverse its former long line of decisions we must adhere to our own construction of our Constitution and laws. Of course, if the Supreme Court shall in a case like this hold that the fourteenth mendment does apply and that the assessment by the front-foot ule under the Kansas City charter is void, we shall conform to its udgment as the final arbiter under the Constitution.

As the assessment was made in strict compliance with the charter and ordinance, we do not think the testimony of the four 130 witnesses to the effect that the benefits to the lots exceeded the cost of the improvement could cure the vice, if any, in the harter and the ordinance.

Plaintiff must stand or fall by the charter provision. The admission of the evidence, however, did not constitute reversible error, as ve hold the charter and the ordinance were sufficient without the vidence, and would have been had it been to the contrary.

II.

The other objection remains.

It is urged that the requirement of the ordinance and contract providing for maintaining and repairing the street on which the paving was done for five years is *ultra vires* on the part of the city and void; that the power of the city to contract for repairs is limited to two years. Speaking for myself, I think the contention of the defendant is sound, but this court has ruled otherwise in Seaboard National Bank *vs.* Woesten, 147 Mo., 467, and Barber Asphalt Co. *v.* Ullman, 137 Mo., 543, and no good purpose will be subserved by repeating the grounds upon which I based my dissent in those cases. The question must be considered settled by the majority opinions in these cases.

It follows that the judgment of the circuit court must be, and is, affirmed.

Sherwood, Robinson, Brace, Marshall, and Valliant, JJ., concur.

JAS. B. GANTT.

And afterwards, to wit, on the 15th day of November, 1900, the further following proceedings were had in said cause, viz:

BARBER ASPHALT PAVING COMPANY, Respondent,
vs.
MARGARET FRENCH ET AL., Appellants.

Now, at this day, there is presented to the Honorable James B. Gantt, chief justice of the supreme court of the State of 131 & 132 Missouri, a writ of error to the Supreme Court of the United States, a citation directed to said respondent, citing and admonishing it to appear at a Supreme Court of the United States on the 14th day of December, 1900; a petition in error, an assignment of errors, and a bond in the sum of one thousand dollars; which said writ of error is allowed, said citation signed, and said petition in error, assignment of errors filed, and said bond approved, ordered filed, and made a part of the record herein.

* * * * * * *

133 And said assignment of errors is in words and figures as follows, to wit:

Supreme Court of the United States, October Term, 1900.

MARGARET FRENCH and HENRY FRENCH, OLIVER H. DEAN, Trustee for William D. McLeod, and William D. McLeod, Plaintiffs in Error,

against

THE BARBER ASPHALT PAVING COMPANY, Defendant in Error.

134 Come now Margaret French and Henry French, Oliver H. Dean, trustee for William D. McLeod, and William D. McLeod, plaintiffs in error, by their counsel, and respectfully represent that they feel themselves to be aggrieved by the proceedings and judgment of the supreme court of the State of Missouri, in bank, in the above-entitled cause and assign error thereto as follows:

First.

The tax bill sued on was issued under a contract and ordinance purporting to be authorized by the city charter of Kansas City and article IX of said city charter, a public law of the State of Missouri. There was no other or further authority for the work or the contract or the ordinance or the special tax bill. The city charter of Kansas City purports to authorize and in form authorizes the city to cause its streets to be paved at the expense and cost of the adjoining and abutting property according to the frontage, without reference to any benefit to the property (so charged and taxed) by reason of such paving, and said State law is contrary to the Constitution of the United States and the fourteenth (14th) amendment thereto. These plaintiffs in error are deprived of their property without "due process of law." The circuit court of Jackson county, Missouri, erred in holding said city charter to be valid and the supreme court of the State of Missouri, in bank, erred in affirming such judgment and in holding said State law to be valid.

Second.

These plaintiffs in error specially set up the invalidity of the charter of Kansas City in their answer in the Jackson circuit court, and they asked an instruction that under the pleadings and evidence the plaintiff therein, The Barber Asphalt Paving Company, could not recover, and another instruction to the effect that the charter of Kansas City, in attempting to authorize the pavement of the streets of the city and charge the whole cost thereof to the adjoining property abutting on the street, without reference to any special
135 & 136 and peculiar benefits to such property was contrary to the Constitution of the United States and the fourteenth amendment thereto, and therefore void. These plaintiffs in error asked the Jackson circuit court to give said instructions and each of them, but said court refused to give them or either of them, and these plaintiffs in error then and there excepted, and in due time, after verdict and judgment, filed their motion for a new trial, on the ground, among others, that the court erred in refusing to give said instructions or either of them, but that court refused to grant a new

trial and plaintiffs in error duly excepted at the time, and on appeal of said cause to the supreme court of the State of Missouri, in bank, these plaintiffs in error assigned as error the action of the Jackson circuit court in refusing to give said instructions or either of them and in refusing to grant a new trial. But on argument of said cause in the supreme court of the State of Missouri, in bank, said court affirmed the judgment of the court below and held that the charter of Kansas City was not contrary to the Constitution of the United States or the fourteenth amendment thereto, and in so holding the supreme court of the State of Missouri erred.

The supreme court of the State of Missouri erred in holding that the charter of Kansas City was a valid law; that court erred in holding that it was a valid authority or any authority for the ordinance or the contract or the tax bill. Said charter is void.

Wherefore the said Margaret French and Henry French, Oliver H. Dean, trustee for William D. McLeod, and William D. McLeod, plaintiffs in error, pray the honorable court to examine and correct the errors assigned, and for a reversal of the judgment of the supreme court of the State of Missouri, in bank, entered in the above-entitled cause, and to enter judgment in this court for these plaintiffs in error.

HENRY FRENCH,
MARGARET FRENCH,
OLIVER H. DEAN,
Trustee for William D. McLeod, and
W. D. McLEOD, *Petitioners,*
By HENRY N. ESS, *Their Attorney.*

* * * * * * *

137 STATE OF MISSOURI, *sct:*

I, Jno. R. Green, clerk of the supreme court of the State of Missouri, certify that the foregoing is a full, true, and complete transcript of the record and proceedings in the above-entitled cause, as fully and complete as the same appears of record and on file in my said office.

Seal of the Supreme Court of Missouri.

In witness whereof I have hereunto set my hand as clerk and affixed the seal of said court.

Done at office, in the city of Jefferson, this 21st day of November, A. D. 1900.

JNO. R. GREEN, *Clerk.*

138 In the Supreme Court of the United States of America, Held at the City of Washington, District of Columbia.

MARGARET FRENCH, HENRY FRENCH, OLIVER H. DEAN, Trustee for William D. M'Cleod, and William D. M'Cleod, Plaintiffs in Error,

vs.

THE BARBER ASPHALT PAVING COMPANY, Defendant in Error.

Stipulation as to Printing Record.

It is hereby stipulated and agreed by and between Edward L. Scarritt, of counsel for defendant in error, and Henry N. Ess, of counsel for plaintiffs in error, that in the printing of the record in the above-entitled cause now filed in this court and brought here by writ of error to the supreme court of the State of Missouri the clerk of the Supreme Court of the United States shall omit the following parts thereof. (The pages referred to in this stipulation are the pages of the original record filed herein and numbered in red ink in the lower, left-hand corner.)

First. Omit the citation and service thereof on page 3.

Second. Omit the answer to each of the second, third, and fourth counts in the petition, as the answer to each of these counts in the petition is identical with the answer to the first count. The part to be omitted begins on page 25, three lines from the bottom, and ends on page 57, with the signature of "Ess & Georgen, attorneys for defendants."

Third. Beginning on page 63, four lines from the top, are copied the tax bills sued on. These end on page 66 with signature, "Peter H. Tiernan, president, by John Malony." In printing omit these. They are copied in the petition and need not be printed a second time.

Fourth. On pages 75 and 76 omit sections of ordinance offered in evidence No. 1023, 1024, 1025, 1026, and 1027. They pertain to the maint*ai*nance of the pavement and are immaterial to the questions to be decided in this case.

139 Fifth. Omit the testimony of Henry R. Kason and E. B. Demareston, pages 76 to 80. This pertains only to the durability of the pavement and is immaterial.

Sixth. Omit pages 85, 86, 87, 88, 89, and the first two lines on page 90, and omit beginning on page 94 with the words "Maintenance of pavement" to the words "General stipulation," on page 95. These are minute specifications and details of the pavement not necessary to the decision of the questions in hand.

Seventh. Under general stipulations, on page 95, after the words "which follows," omit those paragraphs numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 11, 12, and 13. These stipulations are immaterial.

Eighth. On page 101 omit bond for maintenance and official approvals following it.

Ninth. On page 106 omit official certificate of Morris E. Jones, official stenographer.

Tenth. Omit bond for appeal, beginning at bottom of page 106 and ending at bottom of page 107.

Eleventh. Omit affidavit for appeal on page 108.

Twelfth. Omit the petition in eroor on pages 131, 132, and 133, as the errors appear in the assignment of errors and in the briefs to be filed.

Thirteenth. Omit bond for supersedeas on pages 136 and 137.

The clerk of the Supreme Court of the United States is requested to omit printing the portion of the record indicated in the foregoing stipulation, as the printing of them can subserve no useful purpose.

EDWARD L. SCARRITT,
Counsel for Defendant in Error.
HENRY N. ESS,
Counsel for Plaintiffs in Error.

140 [Endorsed:] Margaret French *et al.*, plaintiffs in error, *vs.* The Barber Asphalt Paving Co., defendant in error. Stipulation as to printing record. Henry N. Ess, counsel for plaintiffs in error. Edward L. Scarritt, counsel for defendant in error.

141 [Endorsed:] File No., 17,983. Supreme Court U. S., October term, 1900. Term No., 498. Margaret French *et al.*, P. E., *vs.* The Barber Asphalt Paving Company. Stipulation as to printing record. Filed Dec. 5, 1900.

Endorsed on cover: File No., 17,983. Missouri supreme court. Term No., 498. Margaret French & Henry French, Oliver H. Dean, trustee for W. D. McLeod, and William D. McLeod, plaintiffs in error, *vs.* The Barber Asphalt Paving Company. Filed December 6th, 1900.

No. 498.
Bf. of Ess for P. E.
Filed Feb. 14, 1901.

Office Supreme Court U.S.
FILED
FEB 14 1901
JAMES H. McKENNEY,
Clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 498.

MARGARET FRENCH, ET AL., PLAINTIFFS IN ERROR,

VS.

THE BARBER ASPHALT PAVING COMPANY, DEFENDANT IN ERROR.

STATEMENT AND BRIEF FOR THE PLAINTIFFS IN ERROR, BY

HENRY N. ESS,
Their Counsel.

THE SENTINEL PRINT, INDEPENDENCE, MO.

In the Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 498.

MARGARET FRENCH, ET AL., PLAINTIFFS IN ERROR,

VS.

THE BARBER ASPHALT PAVING COMPANY, DEFENDANT IN ERROR.

STATEMENT AND BRIEF FOR THE PLAINTIFFS IN ERROR.

This suit was begun in the Jackson Circuit Court, in Jackson County, Missouri, by The Barber Asphalt Paving Company against Margaret French, Henry French, Oliver H. Dean (trustee for William D. McCleod), and William D. McCleod, defendants. The petition states that the plaintiff is a corporation duly organized according to law and permitted to do business in Missouri under her laws; that Kansas City is a municipal corporation under the laws of Missouri, and as such corporation it passed an ordinance numbered 5891, entitled "An ordinance to pave Forest avenue from Independence avenue to Twelfth (12th) street," and thereby provided for paving that street; that the board of public works awarded the contract to the plaintiff; that the contract was confirmed by the common council, and that the work has been completed and accepted by the city; that after the work was completed the board of public works computed the cost thereof and assessed and apportioned such cost as a special tax against the land chargeable therewith, as provided by law and as provided in Article IX of the city charter of Kansas City, adopted April 8th, 1889; that thereafter the city issued to the plaintiff a certain tax-bill, payable in four equal installments, in part payment for the cost of the work. The tax-bill is copied in the petition. This tax-bill, as copied, states that lot 12 in block "H" in Ranson & Tally's addition to Kansas City has been charged with the sum of $302.52 cents as a special tax for paving Forest avenue from Independence avenue to Twelfth street, pursuant to the ordinance number 5891; that the work has been completed according to contract by The Barber Asphalt Paving Company, contractor, to whom this tax-bill is issued in part payment for the work, and the sum mentioned has been duly assessed and apportioned against this lot, being the exact amount chargeable against said lot, as provided by law, for its proportion of the cost of said work, and it is a lien against the lot for a year after the last installment becomes due and until foreclosed in court. The tax-bill says it is given by the board of public works of Kansas City, Missouri. The petition then states that the plaintiff receipted to the board of public works for the tax bills, and that one installment is due; that the defendants own the lot. Plaintiff asks judgment for $75.63 for the fourth installment and 10 per cent interest and costs to be levied of this lot only.

There were three other counts in the petition, all like the first. The answer stated several defenses. One that the ordinance was not authorized by the charter; one that the contract was not authorized by the charter. Only one count in the answer need be noticed here. That is the first count. It states that the Defendant Margaret French is the owner in fee and in possession of the lot; that plaintiff paved the street under contract with Kansas City; that on completion of the work the board of public works computed the cost thereof under the contract between the contractor and the city and apportioned the cost thereof according to the frontage on all lots on Forest avenue from Independence avenue to Twelfth street, and charged against this lot its proper proportion according to its frontage on the street. The total cost of the work was $28,339.54 and the total frontage was 4,683.95 feet. (Printed record 9). There was a special contract in writing, and by it Kansas City was not to be liable for the cost of the work or in any way except by issue of tax-bills against the abutting property; that the tax-bills were to be made according to the frontage of the property on the street; that there was no authority for this contract except an ordinance of the city; that an ordinance was passed to pave the street and pay for it in special tax-bills against the abutting property according to the frontage on the street. There was no law authorizing the tax-bill or the contract or the ordinance except Article IX of the city charter and Section 5 thereof. That by this law all lots are charged with the cost of the work according to their frontage on the street without reference to benefits; that this law is contrary to the Constitution of the United States and the fourteenth amendment, and is void; that by this state law, defendants are deprived of their property without due process of law, and that the city charter, the ordinance, the contract, the tax-bills, are all void, as being without authority of law. The Kansas City charter, being unconstitutional, is no authority for any of the proceedings. Judgment is asked for defendants. A like answer was made to each of the other counts in the petition. Plaintiff filed a reply stating that the several lots and this one were benefited to an extent exceeding the cost thereof, and exceeding the amount of the tax-bill. The Missouri law does not allow any further pleading after a reply. At the trial it was admitted that the plaintiff had complied with the Missouri law as to doing business in Missouri; that John Maloney was authorized to sign the tax-bills.

The tax-bills were offered in evidence. The defendants objected to the tax-bills being read in evidence on the grounds that there was no authority of law for them; they are void on their face. It appears that they are void because the charter authorizing them is in conflict with the Constitution of the United States and void. The objection was overruled and defendants excepted and the tax-bills were read in evidence. Then the plaintiff introduced as a witness W. S. Woods. His testimony was to the effect that the property on the street was benefited to an extent exceeding the cost of the work. This testimony was objected to on the ground that it was irrelevant, incompetent and immaterial. This objection was overruled and excepted to. (The Supreme Court of Missouri, in passing on this point, say this was error, but not reversible error. See printed record, p. 49, top).

The plaintiff here rested.

Defendants offered and read in evidence the ordinance of Kansas City for doing this work. (Printed record, pp. 25-26).

This ordinance provides for paving the street with asphalt. "The work shall be paid for in special tax-bills against and upon the lands that may be charged with the cost thereof, according to law."

"And the passage of this ordinance and the doing of said work shall not render Kansas City liable to pay for said work, or any part thereof, otherwise than by the issue of special tax-bills."

The cost of the work shall not exceed $2.57 per square yard. The tax-bills to be issued in installments, payable in one, two, three and four years. (Printed record, p. 26).

Defendants offered and read in evidence the contract for doing this paving. This contract is in printed record, pp. 27 to 32.

This contract recites that The Barber Asphalt Paving Company is the lowest and best bidder for paving Forest avenue, and the company agrees to pave the street.

The contract has this clause—(printed record, p. 31, three lines below "general stipulations:"—

"10. It is further agreed that the passage of the ordinance referred to and the doing of the work shall not render Kansas City liable to pay for the work otherwise than by the issue of special tax-bills." "And the said first party shall assume all risks as to the validity of such special tax-bills and take the same without recourse against Kansas City in any event."

He is to do the work at $2.57 per square yard, payable in special tax-bills, "And that his receipt therefor shall be in full of all claims against Kansas City on account of the work."

This was all the evidence.

Thereupon defendants asked the court to give certain instructions or declarations of law. Under Missouri law, in a suit at law plaintiff or defendant may ask declarations of law or instructions equivalent to a charge to a jury, and either party can predicate error on giving or refusing such declarations of law.

Defendants asked the following instructions:

1. Under the pleadings and evidence plaintiff cannot recover.

2. The ordinance No. 5891, entitled "An ordinance to pave Forest avenue from Independence avenue to Twelfth street," approved July 17th, 1894, is contrary to and against the charter of Kansas City, and is therefore null and void, and the finding and verdict must be for the defendants.

3. The contract offered in evidence for paving Forest avenue is invalid and void and without any authority in Kansas City and her mayor and common council to make the same.

4. The contract offered in evidence and read in evidence is a contract to construct the pavement and maintain and keep the street in repair for five years, and is contrary to the charter of Kansas City, and is forbidden by it and is void and of no effect, and your verdict and finding must be for the defendants.

5. The tax-bills sued on are without any authority of any law of this state, or of the United States, and are therefore null and void.

6. The charter of Kansas City purports to authorize the paving of streets and to authorize the special tax-bills, charging the entire cost thereof on the abutting property, according to the frontage, without reference to any benefits to the property on which the charge is made and the special tax levied, and said charter purports to authorize the levying of the special tax notwithstanding the fact that the work for which it is done is a damage to the property and destroys its value. That law is contrary to and in violation of the fourteenth amendment to the Constitution of the United States.

The plaintiff objected to the court giving these instructions, or any of them. The court sustained the objection and refused to give the instructions, or any of them, and defendants then and there excepted.

The case was then submitted to the court and judgment was rendered against defendants, and defendants filed their motion for a new trial on these grounds:

1. The verdict is against the law.

2. The judgment is against the evidence.

3. The judgment is against the law and the evidence.

4. The court erred in excluding legal and competent and relevant evidence offered by defendants.

5. The court erred in admitting incompetent, irrelevant and illegal evidence on behalf of plaintiff against the objections of defendants.

6. The court erred in refusing to give each and every one of the instructions asked by the defendants.

7. The judgment is otherwise erroneous, illegal, defective and contrary to law.

8. The court erred in not rendering judgment in favor of the defendants and against the plaintiff.

The court overruled this motion and defendants excepted. A bill containing all these exceptions was duly filed.

Within due time defendants filed their motion in arrest. The motion in arrest was on these grounds:

1. The judgment upon the record is erroneous.

2. The judgment is in favor of the plaintiff, whereas, under the pleadings and the evidence, it should be for the defendants.

3. The plaintiff's petition does not state facts sufficient to constitute a cause of action against the defendants.

4. The judgment is otherwise erroneous, illegal, defective and contrary to law.

The court overruled this motion, and thereupon defendants took the case to the Supreme Court of Missouri by appeal.

The defendants brought before the lower court the unconstitutionality of the Kansas City charter in various ways.

FIRST.

It was specially set up in the answer.

SECOND.

We objected to any evidence being offered at the trial. The charter is a public law of the State of Missouri. The petition says the tax-bill is founded on Article IX. This levies the tax according to frontage, without reference to benefits.

THIRD.

We asked several instructions on this point. There can be no recovery under the evidence. We asked a direct instruction that this charter is contrary to the fourteenth amendment.

FOURTH.

In the motion for a new trial we called attention to these errors in the Jackson Circuit Court. We exhausted every effort in that court.

In the Supreme Court of Missouri we set up and assigned the same matters as errors. The leading point in the case as argued and decided was the constitutional validity of the Kansas City charter as to the National Constitution. That appears in the opinion of the court in the printed record, pp. 36 to 49.

The case is here on writ of error to the Supreme Court of Missouri, under Section 709 Revised Statutes of the United States, on the ground that in this case there is drawn in question the validity of a statute of the State of Missouri on the ground of its being repugnant to the Constitution of the United States and the decision of the Supreme Court of Missouri was in favor of the validity of the state law, the Kansas City charter.

The Missouri Constitution shows that the Supreme Court of Missouri is the highest court in the state in which the case could be decided. Article VI in Constitution of Missouri, in Revised Statutes of Missouri for 1899, Vol. 1, in front part of the book, page 86, et seq.

Article IX of the city charter is found in a book published as a law book entitled "Charter and Revised Ordinances, annotated, Kansas City, Missouri, 1898." We copy the Article IX entire except sections having no reference to the matter under consideration.

SECTION 1. (This section refers to width of sidewalks. It is left out).

SECTION 2. *Streets and Sidewalks—Paving—Construction and Repairing—Payment in Special Tax Bills—Board of Public Works—Recommendation by to Pave—Remonstrance—Selection of Material.*— The city shall have power to cause to be graded, regraded, constructed, reconstructed, paved, repaved, blocked, reblocked, graveled, regraveled. macadamized, remacadamized, curbed, recurbed, guttered, reguttered or otherwise improved or repaired, all streets, alleys, sidewalks, avenues, public highways and parts thereof and to construct and reconstruct sidewalks and to sod and plant trees along the side or sides thereof, to be paid for in like manner as such sidewalks are paid for, or as part of the costs and expenses of the construction or reconstruction of such sidewalks, within the city at such times and to such extent, of such dimensions and with such materials and in such manner and under such regulation as may be provided by ordinance and to pay therefor out of the general fund or by issuing special tax-bills as herein mentioned; *provided*, that whenever the common council shall deem it necessary to pave, repave, block, reblock, gravel, regravel, macadamize or remacadamize any street, alley, avenue, public highway or part thereof, within the limits of the city, and payment for such work and improvement is to be made in special tax-bills, the common council shall, by resolution, declare such work or improvement to be necessary, stating the kind of paving material proposed to be used, and such resolution, or the substance thereof, shall be published for ten days (Sundays included) in the newspaper doing the city printing, and unless the resident owners of the city who own a majority in front feet of all the lands belonging to such residents and fronting on the street, alley, avenue, public highway or part thereof to be improved, shall, within thirty days from the first day of such publication, file with the city clerk a remonstrance, signed by them, against the proposed improvement, then the common council shall have power to cause the proposed improvement to be made and to issue special tax-bills therefor, as herein mentioned; *provided*, however, that no such resolution or ordinance shall be passed by the common council except upon recommendation of the board of public works indorsed thereon; and *provided* further, that if the resident owners of the city who own a majority in front feet of all the lands belonging to such residents and fronting on the street, alley, avenue, public highway or part thereof to be improved shall, within thirty days after the first day of the publication of such resolution, file with the board of public works a petition, signed by them, to have such street, alley, avenue, public highway, or part thereof, paved, repaved, blocked, reblocked, graveled, regraveled, macadamized or remacadamized with a different kind of material or in a different manner from that specified in such resolution, then the ordinance providing for the doing of such work or making such improvement shall provide that the work shall be done in the manner and with the material specified in such petition, and in such case the ordinance need not be recommended by the board of public works as aforesaid. If the remonstrance of the resident property owners above mentioned shall be filed with the city clerk, as herein provided, then the power of the common council to make the proposed improvement and pay therefor in special tax-bills, shall cease until a sufficient number of the persons so remonstrating or their grantees shall, in writing, withdraw their names, or the property represented by them from such remonstrance so that said remonstrance shall cease to represent a majority of the resident property owners as above provided, when the common council shall proceed in the manner above mentioned to cause the proposed improvement to be made; *provided* further, however, that if the board of public works shall unanimously recommend to the common council that any business street, alley, avenue, public highway or part thereof, be paved, repaved, blocked, reblocked, graveled, regraveled, macadamized or remacadamized, and the payment therefor is to be made in special tax-bills, and the common council shall, by ordinance, order such work to be done by a vote of two-thirds of the members-elect of each house of the common council, then such work may be done without any resolution, as hereinbefore provided, and regardless of such remonstrance. When the work shall be so recommended by the board of public works and so ordered by the common council as last above mentioned, the resident owners of the city who own a majority in front feet of the lands belonging to such residents and fronting on such street, avenue, alley, public highway or part thereof to be improved, shall have the right to select the material with which such street, alley, avenue, public highway or part thereof shall be paved, repaved, blocked, reblocked, graveled, regraveled, macadamized or remacadamized from not less than two kinds of materials, to be designated by the board of public works, such selection to be made by them within ten days after such ordinance shall have taken effect and been published for ten days in the newspaper at the time doing the city printing, which selection shall be by petition in writing, addressed and delivered to the board of public works. If such selection be not made within such time, then the board of public works shall designate the material with which such street, alley, avenue, public highway or part thereof shall be improved.

SEC. 3. *Payment for Improving Streets—Ordinances and Contracts to Specify How to be Made.*—All ordinances and contracts for all work authorized to be done by section two of this article shall specify how the same is to be paid for, and in case payment is to be made in special tax-bills, the city shall in no event nor in any manner whatever be liable for or on account of the work.

SEC. 4. *Resolution—Remonstrance—Recitals in Ordinance—Business Streets—Objections to Tax Bills.*—When it shall be proposed to pave, repave, block, reblock, gravel, regravel, macadamize or remacadamize any street, alley, avenue, public highway or part thereof and pay therefor in special tax-bills, if the common council shall, by ordinance, find and declare that the resolution provided in section two of this article has been published as therein required and that the resident owners of the city who own a majority in front feet of all the lands belonging to such residents fronting on the street, alley, avenue, public highway or part thereof to be improved have not filed with the city clerk a remonstrance against the doing of such work or a petition for the making of such improvement with a different kind of material or in a different manner from that specified in such resolution, or that such petition was filed for the doing of the work as mentioned in said ordinance, such finding and declaration shall be conclusive for all purposes, and no special tax-bill shall be held invalid or affected for the reason that such resolution was not published as therein required, or that a remonstrance or petition sufficiently signed was filed as therein required, or that such petition was not filed or was insufficiently signed. When the city shall propose to pave, repave, block, reblock, gravel, regravel, macadamize or remacadamize any street, alley, avenue, public highway or part thereof, without resolution of the common council declaring such improvement to be necessary, but upon the unanimous recommendation of the board of public works, if each house of the common council shall, by ordinance, find and declare by a vote of two-thirds of the members-elect of each house that the street, alley, avenue, public highway or part thereof, on which the proposed improvement is to be made, is used or occupied for business purposes, and that the improvement has been unanimously recommended by the board of public works, such finding and declaration shall be conclusive for all purposes, and no special tax-bill that may be issued to pay for the work shall be held invalid or affected for the reason that the work for which they have been issued was not unanimously recommended by the board of public works, or that such street, alley, avenue, public highway or part thereof was not, in fact, used or occupied for business purposes.

SEC. 5. *Payment in Special Tax Bills—Assessment District—Improvements Excluded—Lots and Blocks—Question as to Determined by Common Council—Sidewalks, Curbing and Guttering—Cost of Work on How Paid—Work Done at Street Intersection—Cost of How Charged.*—The cost of all work mentioned in the preceding sections of this article shall, when the same is to be paid for in special tax-bills, be apportioned and paid as follows, viz: the cost of all grading, including the grading of sidewalks, shall be charged as a special tax on all lands on both sides of the street, avenue, or public highway, or part thereof, graded, within the following limits, viz: in case any of the land fronting on the street, avenue, or public highway, or part thereof, graded, be laid off in lots or blocks, property so laid off, from the line of the street, avenue or public highway, back to the center line of the block or blocks, shall be so charged, whether fronting on the street, avenue, or public highway, or not; nevertheless the common council shall have power by ordinance to prescribe that such land shall not be charged beyond the alleys in such blocks, if deemed just and equitable; and in case any land fronting on such street, avenue or public highway, or part thereof, graded, be not laid off into lots, and blocks, then the land so not laid off, and the land in the rear thereof on the line of the street, avenue, public highway, or part thereof, graded, back one hundred and fifty feet, *shall be so charged, whether fronting on the street or not;* and lands liable for such grading shall be charged according *to the value thereof, exclusive of improvements thereon, as provided in the next succeeding section,* and in cases of question on the part of the assessor or the board of public works as to whether any lands fronting on the street, avenue or public highway, or part thereof, be laid off into lots or blocks or not, within the meaning of this section, the common council shall, on the request of the assessor or board of public works, in making out special tax-bills and charging the land for such grading, determine whether or not any particular land or lands fronting on the street, avenue, public highway, or part thereof, graded be laid off or not into lots and blocks within the meaning of this section, and such determination shall be conclusive on all parties interested for all purposes. The cost of all work on any sidewalk, including curbing and guttering along the side thereof, exclusive of the grading of the same, shall be charged as a special tax upon the adjoining lands according to the frontage thereof on the sidewalk. The cost of all other work specified in the first three sections of this article on all streets, avenues, alleys and public highways, or parts thereof, shall be charged as a special tax on the land on both sides of and adjoining the street, avenue, alley or public highway, or parts thereof, improved, *according to the frontage thereof.* The cost of all work mentioned in the first three sections of this article done on spaces fronting on any other street, avenue, alley or public highway, shall be deemed part of the costs of work done on other spaces under the same ordinance and contract, and be charged and paid for accordingly.

SEC. 6. *Grading—Assessment to Pay for—Duty of Assessor—Cost of Other Work—Engineer to Compute and Apportion—Special Tax Bills.*—After a contract shall have been made for the grading or regrading of any street, sidewalk, avenue, or public highway or part thereof, the city assessor shall, on demand of the board of public works, if the work is to be paid for in special tax-bills, cause an assessment to be made of the value of all the lands to be charged with the cost of such grading or regrading, exclusive of improvements thereon, and shall deliver such assessment to the board of public works to compute the costs thereof, and apportion such cost among the several lots or parcels of land to be charged according to the values thereof fixed by the city assessor, as aforesaid, and charge each lot or parcel of land with its proper share of such cost. When any work other than grading or regrading, as last aforesaid, shall be completed, and is to be paid for in special tax-bills, the board of public works shall cause the city engineer to compute the cost thereof, and apportion the same among the several lots or parcels of land to be charged therewith, and charge each lot or parcel of land with its proper share of such cost according to the frontage of such land. The board of public works shall, after the cost of any work has been so apportioned for payment in special tax-bills, except as hereinafter provided, make out and certify in favor of the contractor or contractors to be paid, a special tax-bill for the amount of the special tax, according to such apportionment against each lot or parcel of land to be charged.

SEC. 7. (This is for repairing sidewalks, curbs, and is omitted. Sections 8, 9, 10, 11, 12, pertain to sewers and are omitted. Sections 13, 14, 15, 16 and 17 are omitted. They contain nothing pertaining to the subject matter in hand).

SEC. 18. *Tax Bills—Payment—Cancellation—Lien—Suit on—Jurisdiction of Court—Evidence—Defenses—Interest—Assignable—Execution—Sale by Sheriff—Certificate of Purchase—Redemption—Deed—Contribution When Owner of Undivided Interest in Land Compelled to Pay Whole Tax Bill.*—Every special tax-bill may be paid to the owner or holder thereof and upon presentation of such tax-bill, marked paid, to the city treasurer he shall cancel and mark paid the amount of such tax-bill on the record thereof, which entry, when made, shall have the same effect to discharge the lot or parcel of land affected by such tax-bill from the lien thereof, as if the amount of such tax-bill had been paid to the city treasurer as in the preceding section provided, and such entry shall be evidence of payment of the tax-bill as therein stated. Every special tax-bill issued under the provisions of this article shall be a lien upon the land described therein, upon the date of the receipt to the board of public works therefor, and such lien shall continue for two years thereafter, but no longer, except as in this article otherwise provided, unless suit shall be brought to collect the same within two years from the issue thereof, in which case the lien shall continue until the determination of the legal proceedings to collect the same, including any sale of the property charged; *provided*, however, that if such suit shall be brought within the two years the plaintiff or plaintiffs therein shall at the time, or within ten days after the commencement of suit, and not later than thirty days after the end of the two years, in person or by attorney or agent, file in the office of the city treasurer, a written statement showing the tax-bills sued on, and when and in what court, and against whom the said suit has been brought. The city treasurer shall, immediately after the filing of any such statement, note on the record of such tax-bill the time of filing of such statement and the substance of the same. If the plaintiff or plaintiffs in such suit shall fail to file such statement within the time above limited the land described in the tax-bill sued on shall be free from the lien of the tax-bill and of any judgment in such suit, no matter when rendered, and shall not be sold in satisfaction of any such judgment. Every special tax-bill, if paid within thirty days from the date of issue, shall bear no interest, if not paid within such time shall bear interest from the date of issue at the rate of ten per cent per annum, except as herein otherwise provided. No such tax-bills need give the name of any party owning or interested in the land charged and bound by the lien, and before the suit the owner of any part in severalty or of any undivided interest in any land charged by any tax-bill may pay his share separately, in which case his part or interest shall not be further liable in case of suit. Such tax-bill shall be issued within twenty days from the completion and acceptance of the work, but the failure to issue them within such time shall not affect the validity of the tax-bills. All or any of the owners of the land charged, or of any interest or estate therein, may be made defendants in any suit, but only the right, title, interest and estate of the parties made defendants in any such suit shall be affected or bound thereby, or by the proceedings therein. In case any owner of the land or interest therein shall be unknown, or a non-resident of the State, suit may be brought against such owner separately or together with others, and such unknown or non-resident owner may be proceeded against and charged by giving notice, either by publication in a newspaper or otherwise, as in a suit in the circuit court of Jackson county, to enforce any other lien on land in the county. Every such special tax-bill and the lien thereon shall be assignable and any assignee may sue in his own name. It shall be sufficient for the plaintiff in any suit to plead the making and issuance of the tax-bill sued on, giving the date and contents thereof, and the assignment thereof, if any, and to alledge that the party or parties made defendants own or claim to own the land charged, or some estate or interest therein, as the case may be, and to file the tax-bill in the suit. Special tax-bills against different lots or parcels of land, owned by the same party or parties made defendents, may be joined in one suit, but a separate judgment on each tax-bill shall be rendered and execution shall be issued accordingly. Every tax-bill shall, in any suit thereon, be *prima facie* evidence of the validity of the bill, of the doing of the work and of the furnishing of the material charged for and of the liability of the land to the charges stated in the bill; *provided* that nothing in this section shall be so construed as to prevent any defendant from pleading and proving in reduction of any bill, any mistake or error in the amount thereof, or that the work therein mentioned was not done in a good and workmanlike manner; and *provided* further, that if any party shall plead any mistake or error in the amount of the bill, or that the work was not done in a workmanlike manner, and that such party before the commencement of the suit tendered to the contractor or holder of the bill the full value of the work done and shall establish the same on trial, the recovery shall only be for the amount so tendered and judgment for costs shall be rendered against the plaintiff; and provided further, if it shall be pleaded and proved that the work for which the bill was issued was not done according to the terms of the contract made by the contractor with the city, then the plaintiff or plaintiffs shall recover thereon only the actual value of the work done, if of any value, and if not of any value, the judgment shall be for the defendant. No suit on any tax-bill shall be defeated or affected by any irregularity affecting any other bill, or matter rendering any other bill invalid in whole or in part. In a suit on any special tax-bill the judgment shall be special that the plaintiff shall recover the amount found due including interest, together with costs, to be levied and made off the land described in the tax-bill, and a special execution shall issue to sell the land to pay any such judgment, interest and costs. The judgment, exclusive of costs, shall bear interest at the same rate as the tax-bill. Suits on special tax-bills issued under this article may be brought in any court of competent jurisdiction. When the amount due on any tax-bill shall not exceed $300, suit may be brought thereon in the Circuit Court of said Jackson county or before any justice of the peace of the city or of Kaw township in said county, but to enforce any judgment rendered by any justice of the peace a transcript of the judgment shall be filed in the office of the clerk of the Circuit Court of Jackson county, at said city, and duly docketed, recorded and indexed as a judgment of that court; whereupon a special execution may be issued out of that court the same as if the judgment had been rendered in that court. Upon sales made by the sheriff under any such special execution, he shall issue to the purchaser a certificate of purchase, setting forth the substance of such special execution, the date of sale, the purchaser, the property sold, and the amount bid. If the property so sold be redeemed within one year from the date of such sale by payment to the sheriff of the amount due on said judgment, including interest and costs up to the date of redemption by the owner of or party interested in the said property, no deed shall be given by the sheriff. Upon such redemption as herein provided of any lot or parcel of land sold under such special execution the judgment against the same and the lien thereon shall be satisfied on the record of such judgment in the office of the clerk of the Circuit Court aforesaid by said clerk upon presentation of the receipt of the sheriff for the amount necessary for redemption. If the lot or parcel of land so sold be not redeemed, as herein provided, a deed shall be given at the end of one year from the date of said sale by the sheriff to the holder of said certificate. Such deed may be given to the original holder of such certificate or his assignee and shall vest all the right, title, interest and estate in the land so sold that defendants and each of them owned at the time that the lien of the tax-bill commenced, or acquired afterward, and every such special judgment, as herein provided, shall bind all the right, title, interest and estate in the land that defendants and each of them owned at the time that the lien of the tax-bill commenced or acquired afterward. Proceedings on special executions on judgment on special tax bills shall, except as herein provided, including the making of deeds to purchasers, conform as far as practicable to proceedings on other special executions from the Circuit Court. Such certificate of purchase shall be delivered by the sheriff to the purchaser, or his assignee, on payment of the amount bid, which certificate shall be executed and acknowledged by such sheriff before an officer authorized to take acknowledgments of instruments affecting real estate, and shall be filed for record in the office of the recorder of deeds of Jackson county, at Kansas City, within six months after the date of same. Parties interested in the land not made defendant shall not be affected thereby, and if they claim, through or under any party defendant, by right acquired before such suit was brought, may redeem from the purchaser or otherwise assert their rights according to equity and good conscience. In case the owner of any undivided interest or particular estate in any land charged be compelled by suit to pay on account of any such tax-bill more than he ought equitably to pay, as between him and others interested in the land, such owner so paying shall be subrogated to the lien of such tax-bill, and may, by proper proceedings in any court of competent jurisdiction, enforce such lien and have the equities between such owners so paying and other parties interested in the land adjusted, though such other parties were not parties defendant to the original suits in the tax-bill, and though such subsequent proceedings may be commenced after two years from the issue of the tax-bill, and the lien of the tax-bill shall continue after the two years for the purpose of such remedy, or the owner so paying shall be entitled to contribution from others according to equity without enforcing the lien.

Sections 19 and 20 have no reference to the matter under consideration, and are omitted.

SEC. 21. *Street—Cleaning, Sprinkling and Maintaining—Contracting and Paving For.*—The city may cause the driveway portions of any street, avenue, public highway or part thereof, to be cleaned, sprinkled and maintained and kept in repair, or to be cleaned, or to be sprinkled, or to be maintained and kept in repair, and may contract therefor in such manner as may be provided by ordinance for a period of time not to exceed two years, and pay therefor out of the general fund, or by issuing special tax-bills as herein mentioned; *provided*, that when the common council shall deem it necessary that a contract be made for doing any of the work above mentioned, payment for which is to be made in special tax-bills, it shall, by resolution, declare such work or improvement to be necessary, stating the kind of work or improvement to be done, and the street, avenue, or part thereof, on which it is proposed to have such work done and the length of time for which a contract is to be let therefor, and such resolution or the substance thereof, shall be published for ten days in the newspaper doing the city printing, and unless the resident owners of the city who own a majority in front feet of all the lands belonging to such residents and fronting on the street, avenue or public highway, or part thereof on which such work is to be done, shall, within thirty days after the first day of such publication, file with the city clerk a remonstrance signed by them against the proposed improvement, then the common council shall have the power to cause the proposed work or improvement to be made and to contract therefor as herein provided and to issue tax-bills to pay therefor as herein mentioned; *provided* further, however, that no such resolution or ordinance shall be passed by the common council except upon the recommendation of the board of public works endorsed thereon. If the remonstrance of the resident property owners above mentioned shall be filed with the city clerk as herein provided, then the power of the common council to cause the proposed work to be done shall cease until a sufficient number of the persons so remonstrating or their grantees shall, in writing, withdraw their names or the property represented by them from such remonstrance, so that said remonstrance shall cease to represent a majority of the resident owners as above provided, when the common council may again proceed in the manner above mentioned. When the city shall have entered into a contract for the doing of any of the work in this section mentioned, and payment therefor is to be made in special tax-bills, the cost thereof shall be apportioned according to the frontage of the property on the street or avenue or part thereof named in the contract for doing the work, and tax-bills shall be issued against each tract or parcel of land for its proportionate cost, which tax-bills shall be issued at such intervals of time during the continuance of such contract as payment in full for all work done under the contract to the date of issue of such tax-bills, and shall be payable in such a period of time from the date of issue thereof, and shall bear such rate of interest as may be provided in the ordinance for the doing of such work. Such tax-bills shall be a lien on the property against which they are issued, and the provisions relating to special tax-bills which may be issued pursuant to authority given in this article, except the section relating to the issuing of tax-bills payable in installments, shall, so far as applicable, and not in conflict with the provision herein contained, apply to tax-bills issued under this section.

SEC. 22. *Petitions and Remonstrances to be Canvassed—Certificate as to.*—Whenever petitions for or remonstrances against public improvements are required by this charter to be signed by resident property owners the board of public works shall canvass the same and ascertain whether the signatures thereon represent a majority of front feet owned by resident owners of the property to be improved and certify the result of such canvass to the common council, and such certificate shall be *prima facie* evidence of the facts therein stated.

SEC. 23. *Streets—Paving and Other Improvements—Payment for in Installments—Interest—Suits to Collect—Objections to Tax Bills to be Filed—Line and Assignment of Tax Bills—Other Provisions Concerning.*—The common council may by ordinance provide that special tax-bills issued for the grading, regrading, paving, repaving, construction, reconstruction, blocking, reblocking, graveling, regraveling, macadamizing, remacadamizing, curbing, recurbing, guttering, reguttering, or the construction or reconstruction of sidewalks, including sodding and planting of trees, or other improvements of any street, alley, sidewalk, avenue, public highway or part thereof, or the construction of sewers, shall be made payable in four equal installments, and such tax-bills when issued shall be payable and collectible as follows: The first installment shall become due and collectible on the 31st day of May next succeeding the date of issue of the tax-bills, *provided*, that if such period is less than thirty days after the issue of the tax-bills, then the first installment shall become due and collectible on the 31st day of May of the next year; the second installment shall become due and collectible in one year, the third installment in two years, and fourth installment in three years after the first installment is due and collectible, as above mentioned; *provided*, however, that the owner of the property charged with the payment of such tax-bills or the owner of any interest therein shall have the privilege of paying the same in full at any time before the expiration of thirty days from the date of the issue thereof; and *provided* further, that the owner of the property charged with the payment of such tax-bills, or the owner of any interest therein, shall have the privilege of paying such tax-bills in full at any time by paying all interest thereon to a period ninety days after the date of such payment, unless such payment is made within less than ninety days of the maturity of the next installment, and then by paying interest thereon to the date when the next installment becomes due and payable. Such tax-bills, including each installment thereof, if not paid in full before the expiration of thirty days from the date of the issue thereof, shall bear interest from the date of issue at the rate of seven per cent per annum, and when any installment becomes due and collectible as herein provided, interest thereon and on all unpaid installments shall be due and collectible to that date. If any installment of any such tax-bills or interest thereon be not paid when due, then all the remaining installments shall immediately become due and collectible, together with interest thereon at the rate of ten per cent per annum from the date of issue of such tax-bills, less the sum of any interest that may have already been paid on said installments. Suits may be brought to enforce the payment of such tax-bills or any installment or installments thereof, with all interest thereon, in the manner herein provided for the bringing of suits on other tax-bills; *provided*, however, that the owner or owners of any tract or parcel of real estate charged with the payment of such tax-bills, or the owner or owners of any interest in such tract or parcel of real estate shall, within sixty days from date of issue of the tax-bills, file with the board of public works a written statement of each and all objections which he or they may have to the validity of such tax-bills, the doing of the work, the furnishing of the materials charged for, the sufficiency of the work or materials therein used and any mistake or error in the amount thereof; and in any suit on any tax-bill issued pursuant to this section, no objection or objections to it shall be pleaded or proved other than those that have been filed with the board of public works within the period aforesaid. The lien of all tax-bills issued under this section shall continue for a period of one year after the last installments specified therein shall have become due and payable and no longer, unless within such year suit shall have been instituted to collect such tax-bill and notice of the bringing of such suit shall have been filed with the city treasurer, in which case the lien of such tax-bill shall continue until the termination of such suit and until the sale of the property under execution on the judgment establishing the same, and no default in the payment of any previous installment shall operate to diminish the period during which such lien shall continue. Such tax-bills and liens thereof shall be assignable and shall be of the same force and effect, and suits may be brought thereon in the same manner as other tax-bills issued by this city, and all other provisions relating to special tax-bills issued pursuant to the authority given in this article shall apply to those issued under this section, excepting so far only as the other provisions of this article conflict with those contained in this section.

Section 24 omitted, not important here.

Article XVII, City Charter of Kansas City:

SEC. 12. *Public Improvements—Lowest and Best Bidder—Repair by Days Work.*—All city improvements of whatever kind or character, including the erection of all public buildings, made or to be erected at the expense of the city, and *including all work to be paid for in special tax-bills*, except as in this charter otherwise provided, shall be let by contract to the lowest and best bidder as shall be provided by ordinance; *provided*, however, that nothing in this section shall be so construed as to prevent repair by day's work of streets, alleys, and other public places, curbing, sewers, culverts, buildings or other city property, so far as may be necessary, under the direction of the board of public works.

Constitutional provisions in the various Constitutions of Missouri:

Constitution of Missouri of A. D. 1820, contained in Revised Statutes of Missouri, 1825, Vol. I, p. 59. Article XIII (13) Bill of Rights, Section 7:

"7. That courts of justice ought to be open to every person, and certain remedy afforded for every injury to person, property or character; and that right and justice ought to be administered without sale, denial or delay; and *that no private property ought to be taken or applied to public use without just compensation.*"

In revised Statutes of 1835, p. 27, Sec. 7, Art. XIII (13) Bill of Rights. Same as above.

Revised Statutes of Missouri, 1845, p. 43, Sec. 7, State Constitution Art. XIII (13), Declaration of rights, same language.

Revised Statutes of Missouri, 1855, Vol. 1, p. 83, State Constitution Art. XIII (13), Sec. 7, Declaration of rights, same language.

Constitution of Missouri, 1865, in General Statutes of Missouri, 1865, p. 23, Art. 1, Declaration of rights, Sec. XVI.

"That no private property ought to be taken or applied to public use without just compensation."

In the Constitution of Missouri of 1875 many changes were made.

Revised Statutes 1879, Vol. I, p. 57, Sec. 20, provides that no private property can be taken for private use and whether the use is public is a judicial question.

SEC. 21. Private property shall not be taken or damaged for public use without just compensation. Such compensation shall be ascertained by a jury or board of commissioners of not less than three freeholders, in such manner as may be prescribed by law; and until the same shall be paid to the owner or into the court for the owner, the property shall not be disturbed or the proprietary rights of the owner therein divested. The fee of all land taken for railroad tracks without consent of the owner, shall remain in such owner subject to the use for which it is taken.

This is yet the language of our Constitution.

Revised Statutes of Missouri, 1889, Vol. I, p. 61, Sec. 21.

Revised Statutes 1899, Vol. I, p. 66, Sec. 21, Art. II, Bill of rights. Same language.

Life, liberty and property have thus been secured in the Constitutions of Missouri:

Constitution 1820, Art. XIII, Sec. 9, p. 59, in Statutes of 1825, Vol. 1.

"That the *accused* can not be compelled to give evidence against himself, nor be deprived of life, liberty or property, but by the judgment of his peers or the law of the land.

Revised Statutes of Missouri, 1835, pp. 27, 28, Sec. 9. No change.

Revised Statutes of Missouri, 1845, p. 44, Sec. 9. No change.

Revised Statutes 1855, Vol. 1, p. 84, Sec. 9. No change.

General Statutes of Missouri, 1865 (Constitution), p. 23, Sec. XVIII. Same words.

Constitution of 1875, in Revised Statutes of Missouri, 1879, vol. 1, p. 57, Sec. 30.

"That no person shall be deprived of life, liberty or property without due process of law." These rights were secured to *the accused*. This Constitution took effect in 1875, seven years after the adoption of the Fourteenth Amendment to the Constitution of the United States.

Constitution of Missouri in Revised Statutes of Missouri, 1889, Vol. 1, p. 63, Sec. 30. Same language.

Revised Statues of Missouri, 1899, Vol. 1, p. 67, Sec. 30. Same language.

Constitution of Missouri on the subject of taxation:

Constitution of 1820, in Revised Statutes of Missouri, 1825, Vol. 1, p. 61, Sec. 19.

"SEC. 19. That all property subject to taxation shall be taxed in proportion to its value."

This has been continued to the present time.

See Constitution in Revised Statutes of 1835, p. 28. Still numbered "19" in Article XIII, Declaration of rights.

Revised Statutes 1845, of Missouri, and in 1855, 1865 and 1879. This is the Constitution of 1875.

Article X of Constitution of Missouri of 1875 is thus:

SECTION 1. *Taxing power, how exercised.*—The taxing power may be exercised by the General Assembly for State purposes, and by counties and other municipal corporations, under authority granted to them by the General Assembly, for county and other corporate purposes.

SEC. 2. *Power to tax corporations not to be surrendered.*—The power to tax corporations and corporate property shall not be surrendered or suspended by act of the General Assembly.

SEC. 3. *Taxes for public purposes must be uniform.*—Taxes may be levied and collected for public purposes only. They shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and all taxes shall be levied and collected by general laws.

SEC. 4. *Taxes in proportion to value.*—All property subject to taxation shall be taxed in proportion to its value.

SEC. 5. *Railway corporations, taxed for what purposes.*—All railroad corporations in this State, or doing business therein, shall be subject to taxation for State, county, school, municipal and other purposes, on the real and personal property owned or used by them, and on their gross earnings, their net earnings, their franchises and their capital stock.

SEC. 6. *Property exempt from taxation.*—The property, real and personal, of the State, counties and other municipal corporations, and cemeteries, shall be exempt from taxation. Lots in incorporated cities or towns, or within one mile of the limits of any such city or town, to the extent of one acre, and lots one mile or more distant from such cities or towns, to the extent of five acres, with the buildings thereon, may be exempted from taxation, when the same are used exclusively for religious worship, for schools, or for purposes purely charitable; also, such property, real or personal, as may be used exclusively for agricultural or horticultural societies; *provided*, that such exemptions shall be only by general law.

SEC. 7. *Other exemptions void.*—All laws exempting property from taxation, other than the property above enumerated, shall be void.

SEC. 8. *Rate for State purposes.*—The State tax on property, exclusive of the tax necessary to pay the bonded debt of the State, shall not exceed twenty cents on the hundred dollars valuation; and whenever the taxable property of the State shall amount to nine hundred million dollars, the rate shall not exceed fifteen cents.

SEC. 9. *Liability of municipalities—no commutation.*—No county, city, town or other municipal corporation, nor the inhabitants thereof, nor the property therein, shall be released or discharged from their or its proportionate share of taxes to be levied for State purposes, nor shall commutation for such taxes be authorized in any form whatsoever.

SEC. 10. *General Assembly shall not tax municipalities, when.*—The General Assembly shall not impose taxes upon counties, cities, towns or other municipal corporations or upon the inhabitants or property thereof, for county, city, town or other municipal purposes but may, by general laws, vest in the corporate authorities thereof the power to assess and collect taxes for such purposes.

SEC. 11. *Rates for local purposes—limits—how increased for schools and erecting public buildings.*—Taxes for county, city, town and school purposes may be levied on all subjects and objects of taxation; but the valuation of property therefor shall not exceed the valuation of the same property in such town, city or school district for state and county purposes. For county purposes the annual rate on property, in counties having six million dollars or less, shall not, in the aggregate, exceed fifty cents on the hundred dollars valuation; in counties having six million dollars and under ten million dollars, said rate shall not exceed forty cents on the hundred dollars valuation; in counties having ten million dollars and under thirty million dollars, said rate shall not exceed fifty cents on the hundred dollars valuation; and in counties having thirty million dollars or more, said rate shall not exceed thirty-five cents on the hundred dollars valuation. For city and town purposes the annual rate on property in cities and towns having thirty thousand inhabitants or more shall not, in the aggregate, exceed one hundred cents on the hundred dollars valuation; in cities and towns having less than thirty thousand and over ten thousand inhabitants, said rate shall not exceed sixty cents on the hundred dollars valuation; in cities and towns having less than ten thousand and more than one thousand inhabitants, said rate shall not exceed fifty cents on the hundred dollars valuation; and in towns having one thousand inhabitants or less, said rate shall not exceed twenty-five cents on the hundred dollars valuation. For school purposes in districts, the annual rate on property shall not exceed forty cents on the hundred dollars valuation: *Provided*, The aforesaid annual rates for school purposes may be increased, in districts formed of cities and towns, to an amount not to exceed one dollar on the hundred dollars valuation, and in other districts to an amount not to exceed sixty-five cents on the hundred dollars valuation, on the condition that a majority of the voters who are tax-payers, voting at an election held to decide the question, vote for said increase. For the purpose of erecting public buildings in counties, cities or school districts, the rates of taxation herein limited may be increased when the rate of such increase and the purpose for which it is intended shall have been submitted to a vote of the people, and two-thirds of the qualified voters of such county, city or school district, voting at such election, shall vote therefor. The rate herein allowed to each county shall be ascertained by the amount of taxable property therein, according to the last assessment for state and county purposes, and the rate allowed to each city or town by the number of inhabitants, according to the last census taken under the authority of the State, or of the United States; said restrictions as to rates shall apply to taxes of every kind and description, whether general or special, except taxes to pay valid indebtedness now existing, or bonds which may be issued in renewal of such indebtedness.

SEC. 12. *Municipal indebtedness, limit of.*—No county, city, town, township, school district or other political corporation or subdivision of the State, shall be allowed to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the voters thereof voting at an election to be held for that purpose; nor in cases requiring such assent shall any indebtedness be allowed to be incurred to an amount including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the assessment next before the last assessment for State and county purposes, previous to the incurring of such indebtedness: *Provided*, That with such assent any county may be allowed to become indebted to a larger amount for the erection of a court-house or jail. *And provided further*, That any county, city, town, township, school district, or other political corporation or subdivision of the State, incurring any indebtedness, requiring the assent of the voters as aforesaid, shall, before or at the time of doing so, provide for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for payment of the principal thereof, within twenty years from the time of contracting the same.

Sections 13 to 21 inclusive, are omitted, as not important to question in controversy.

The Constitutional validity of a State Statute is here called in question. This court has jurisdiction without regard to the amount in controversy. Revised Statutes of the United States, Section 709.

Buel vs. Van Ness, 8 Wheaton 312.
Williamson vs. Eggleston, 170 U. S. 304 at 308. ($15 involved.)
Parsons vs. District of Columbia, 170 U. S. 45.

These tax-bills are issued to pay for street paving and the language of the State law (Sec. 5, Art. IX, at end of it) is the cost "shall be charged as a special tax on the land on both sides of and adjoining the street, avenue, alley or public highway, or parts thereof, improved, *according to the frontage thereof.*"

Then this tax is levied without *reference to benefits.*

Such has been the construction of this and like statutes by our courts.

McQuiddy vs. Smith, 67 Mo. Appeals, 205 at 207 et seq. (Decided in 1896.)
Keith vs. Bingham, 100 Mo. 300. (Decided in 1889.)
Moberly vs. Hogan, 131 Mo. 19 et seq. (Decided in 1895.)

See opinion of the Missouri Supreme Court in this case. (Printed Record, p. 49.)

In case of McQuiddy vs. Smith the facts run thus:

There was a proceeding in court to ascertain if there were any damages to accrue to Smith's property by reason of the proposed grading.

The Missouri Constitution of 1875 provided that private property shall not be taken or *damaged for public use without just compensation* as quoted above. Article VIII in the City Charter is the law devoted to the subject of ascertaining damages and providing for their payment. By that law notice is to be given to all parties and an opportunity to be heard in court. In this case Smith was not a party to the proceeding and had no notice thereof and was not bound by it. The street was graded and he sued the city and recovered judgment for $2,750, for damaging his property for public use. As he was not a party to the Statute proceeding and had no notice thereof he was not bound by it. He was afterwards sued on the tax-bill for grading the street. The above facts appeared and defendant claimed that his property was not subject to this charge for doing work which was a $2,750 damage to his property. The court below rendered judgment against him and the Appellate Court affirmed the judgment, ordering the lot sold to pay its pro-rata share of the cost of doing it a $2,750 damage.

Says the court (page 210).

"So, then, it is no defense to this tax-bill that the property of these defendants may, in fact, have been injured rather than benefitted by the street grading. The judgment is for the right party and will be affirmed." "To pay for such grading, too, the city is authorized to assess against the abutting real estate the cost thereof."

"General expressions in every opinion are to be taken in connection with the case in which these expressions are used."

Cohens vs. State of Virginia, 6 Wheaton 399, language of Chief Justice Marshall quoted in opinion of the Missouri Supreme Court in the case at bar. Speaking with reference to McQuiddy vs. Smith above, we add the interpretation to the language used in construing the law. "To pay for such grading (in that case) too, the city is authorized to assess against the abutting real estate (Mr. Smith's included) the cost thereof," even if the grading did Mr. Smith's lot a $2,750 damage. *This law* made that tax-bill valid. The court so *interprets the law*.

In Keith vs. Bingham, 100 Mo. 300, defendant set up this defense (it was a grading tax-bill for grading May street in Kansas City):

"Defendant, for a third defense to the tax-bills, states that the lot described in plaintiff's petition is now, and was at all the times stated in plaintiff's petition, private property. That the grading mentioned in plaintiff's petition was done for public use, and *damaged and did not benefit said lot*. That no compensation was made or tendered to or paid into court for any person as the owner af said lot on account of said damages. Wherefore defendant asks judgment." A demurrer was sustained to this defense.

In rendering the opinion the court said: "Looking at this defense from the most favorable standpoint, it is evident that it is untenable. The section of the (State) Constitution just quoted refers to, and is intended to regulate, the exercise of right of eminent domain, whereas special assessments for local improvements, such as the tax-bills before us, are referable to, and sustainable under the taxing power. This distinction is well recognized here and elsewhere in the United States. Garrett vs. St. Louis (1857), 25 Mo. 505; Lewis on Eminent Domain, Sec.

5. If the taxing power has been called into play in the mode required by law for the purpose of paying for a local improvement, *such as paving or grading a street, it is no defense to a bill issued therefor, to say, as is said here, that the street or the improvement, damaged and did not benefit the property, though if such were the fact the party injured might have his action* (on a proper showing) under the Constitution for such injury, meaning Constitution of Missouri of 1875.

Moberly vs. Hogan 131, Mo. 19. This was a paving tax-bill like that in controversy here. The statute law involved is subdivision "Fifth," on page 91, Session Acts of Missouri Legislature A. D. 1893. It provides thus:

"Fifth." The cost of paving, etc., all streets, etc., shall be levied as a special assessment upon all lots and pieces of ground upon either side of such street, etc., abutting thereon, along the distance improved, *in proportion to the front foot.* There is no provision for supervision by any court or any hearing before any tribunal.

This was a paving tax-bill like that at bar. At the trial defendant offered to prove that the pavement was of no benefit to his lot. This testimony was objected to; the objections were sustained and the court refused to allow the defendant to show that the lot was not benefited by the paving. After an unsuccessful motion for a new trial, defendant appealed the case to the Supreme Court, 131 Mo., page 22, bottom. Says the court: "At the trial the court refused to allow defendant's offer of testimony to show that the lot was not benefited by the improvement, but that its value was destroyed thereby."

Page 24. "The trial court committed no error in excluding the defendant's evidence offered."

"The authority invested with the power of taxation for such purposes determines the occasion for the tax, and levies it upon the property subject to the tax. Where that is regularly done, in accordance with the terms of the law conferring the power, the propriety of the tax in the particular instance is not a judicial question, and it is not reviewable by the courts in the manner here attempted."

The power is to levy a tax irrespective of benefits.

The court cannot supervise or set aside this power or any action under it.

The Supreme Court of Missouri, in this very case at bar, hold that the Kansas City charter authorizes the levy of this tax without reference to benefits, and even if the work done is no benefit to the property. Near the close of the opinion in this record, on page 49 of printed record, is the following language:

"As the assessment was made in strict compliance with the charter and ordinance, we do not think the testimony of the four witnesses, to the effect that the benefits to the lots exceeded the cost of the improvement, could cure the vice, if any, in the charter and the ordinance."

"The plaintiff must stand or fall by the charter. The admission of the evidence, however, did not constitute reversible error, as we hold the charter and ordinance were sufficient without the evidence and *would have been, had it been to the contrary.*"

The construction thus put on this statute by the courts of the state become a part of it the same as if copied in it.

Chicago Union Bank et al. vs. Kansas City Bank, 136 U. S. 223, Loc Cit. 235.
Christy vs. Pridgeon, 4 Wall 196 Loc Cit, 203-4.
Detroit vs. Osborne, 135 U. S. 492 Loc Cit, 497-8-9.

The common council of Kansas City cannot determine that abutting property is benefitted and how much, because *the power to do so was never conferred.*

Corporations can exercise only such powers as are granted.

"No matter how much authority there may be in the legislature to grant a particular power, if the grant has not been made the city can not act under it."

Ottawa vs. Carey, 108 U. S. 110, Loc. Cit. 122, approved in Barret vs. Dennison, 145 U. S. 135 at 139.
Knapp vs. Kansas City, 48 Mo. App. 485 at 492.
City of St. Louis vs. Bell Tel. Co., 96 Mo. 623 at 628-9.
City of St. Louis vs. Laughlin, 49 Mo. 559 at 562.

City of Joplin vs. Lockie, 78 Mo. App. 8 at 12-3.
Ruggles vs. Collier, 43 Mo. 353 at 375.

"Their charter is the constitution which authorizes them to act; it is in the nature of a grant of powers, and they can exercise such powers and such only as are contained therein."

Ruggles vs. Collier, supra, at page 375.
City to use vs. Clemens, 43 Mo. 395 at 404.
Pacific R. R. Co. vs. Seeley, 45 Mo. 212 at 220.
City of Carondelet vs. Picket, 38 Mo. 125 at 128-9.
Zottman vs. San Francisco, 20 Cal. 96 American Decisions, Vol. 81, p. 96. An able opinion by the late Justice Field, of this court.
State vs. Smith, 31 Iowa 495 6.
Sharp vs. Speier, 4 Hill, 82-3-4-5.

By this law there is not anywhere any forum or tribunal to which the property owner can at any time apply for relief when his property is about to be taxed or assessed, or after it has been taxed or assessed.

Then this Kansas City charter is a law to levy this local tax without reference to benefits and to the extent of the excess of the cost of the work over the special and peculiar benefits to the abutting property, is a taking of private property for public use without just compensation, and thereby the State of Missouri deprives these plaintiffs in error of their property without due process of law.

Norwood vs. Baker, 172 U. S. 269 et seq.
Hutchinson vs. Story, 92 Texas, 688.
City of Norfolk vs. Young, 97 Va. 728.
Fay vs. Springfield, 94 Fed. Rep. 409.
Sears vs. Street Commissioners, 173 Mass. 350.
Dexter vs. Boston, 57 N. E. Reporter 379.
Adams vs. City, 57 N. E. Rep. 114.
McKee vs. Town of Pendleton, 57 Rep. 532.
Charles vs. City of Moline, 98 Fed. Rep. 166.
Same Case, 100 Fed. Rep. 538.
Lyon vs. Town of Tonawonda, 98 Fed. Rep. 361.
Conley vs. City of Spokane, 99 Fed. Rep. 840.
Parker vs. City of Detroit, 103 Fed. Rep. 357.
Birdnall vs. Huff, 103 Fed. 363.

When private property is taken for public use by the state or under its authority, "due process of law" embraced in the fourteenth amendment to the Constitution of the United States, requires that just compensation should be paid or secured to the owner.

Chicago, Burlington, etc., R. R. Co. vs. Chicago, 166 U. S. 226 at 235-6-7-8-9.

The balance of this brief is merely in reply to what may be urged against the decision of this court in Norwood vs. Baker, 172 U. S. 269.

Benefit alone is the foundation of this tax. Without benefit the tax is confiscation.

In addition to cases cited by this court in Norwood vs. Baker, in 172 U. S. 269 at 278-9, 280-1-2-3-4-5-6-7, we call attention to the following:

Sheehan vs. The Good Samaritan Hospital, 50 Mo. 155 at 158.

Noonan vs. Smith, 50 Mo. 525 at 528-9.

City of Carondelet vs. Pickett, 38 Mo. 125 at 131 (bottom) and 132.

State Ex Rel. R. R. Co. vs. City of Kansas, 89 Mo. 34 at 39 (bottom) and 40.

Farrar vs. St. Louis, 80 Mo. 379 (sections of Mo. Constitution on page 386) at 386-7-8-9 and 390.

Cases reviewed are all on benefits.

McCormack vs. Patchen, 53 Mo. 33 at 36, (upper half of page) and page 38.

Zoeller vs. Kellog, 4 Mo. Appeals 163 at 165 and 167-8 (cited in Norwood vs. Baker).

City of St. Louis to Use of Seibert vs. Allen, 53 Mo. 44 at 54.

City of St. Louis to Use vs. Clemens, 52 Mo. 133 at 143, upper half of page.

State Ex Rel. vs. Angert, 127 Mo. 456 at 462-3.

Kansas City vs. Ward, 134 Mo. 172 at 178-9.

Newby vs. Platte County, 25 Mo. 258.

Pacific R. R. vs. Chrystal, 25 Mo. 544 at 546 for instruction.

Louisiana and Frankford Plank Road Co. vs. Pickett, 25 Mo. 535 at 537 for instruction.

St. Louis & St. Joseph R. R. Co. vs. Richardson, 45 Mo. 468, at 468 (bottom of page) and 469.

Lee vs. Tebo & Neosho R. R. Co., 53 Mo. 178 at 179 and 180.

Mississippi River Bridge Co. vs. Ring, 58 Mo. 491 at 497.

John Hosher vs. Kansas City, etc., R. R. Co., 60 Mo. 303 at 304.

State Ex Rel. Farron vs. City of St. Louis, 62 Mo. 244 at 246, upper third page, blending eminent domain and taxing tower.

City of Springfield vs. Smock, 68 Mo. 394 at 395-6.

Wyandotte, K. C. & N. R. R. Co. vs. Waldo, 70 Mo. 629; instruction at 631-2.

Combs vs. Smith, 78 Mo. 32 at 39 and 40.

Jackson County vs. Waldo, 85 Mo. 637 at 638; middle of page, for instructions.

State Ex Rel. vs. Kansas City, 89 Mo. 34 at 41-2-3.

McReynolds vs. Kansas City R. R. Co., 110 Mo. 484; instructions 487-8.

Dougherty vs. Brown, 91 Mo. 26 at 31.

Bryan vs. Kansas City & S. E. R. R. Co., 111 Mo. 462-3 for instruction.

St. Louis, K. & N. R. R. Co. vs. St. Louis Stock Yards Co., 120 Mo. 541 at 558; instruction assumes special benefit; 137 Mo. 377 instruction at 383, top, and comments referring to 110 Mo. at 484.

Fowler vs. Rothan, 142 Mo. 670 at 679 and 680 to page 685.

Stuart vs. Palmer, 74 N. Y. 183 at 189.

"Assessments for local improvements can be justified only upon the theory that the lands upon which they are laid are specially benefited by the improvements for which they are laid, and hence ought to bear the burden rather than property generally; and if a law should authorize such assessments to be laid, without reference to benefits, it would either take property for the public good, without compensation, or it would take property from one person for the direct benefit of another; and in either aspect it would be unconstitutional."

Krily vs. Shaw, 19 Penn. 258.

Schenly vs. Commonwealth, 36 Penn. 29.

McGonigle vs. Alleghany City, 44 Penn. 118. In the matter of Washington Avenue, 69 Penn. 360.
Patterson vs. Society, etc., 24 N. J. 385.
Tide Water Co. vs. Coster, 18 N. J. Eq. 519. In the matter of Drainage of Lands, 35 N. J. 497.
St. John vs. East St. Louis, 50 Ills. 92.
Lee vs. Ruggles, 62 Ills. 427. In the matter of Albany street, 11 Wend. 149.
Litchfield vs. Vernon, 41 N. Y. 123.

Special assessments on real estate for benefits conferred has long been established in Missouri. The decisions began in Missouri under Revised Statutes of Missouri, 1845, p. 974. sec. 17.

"SEC. 17. In assessing such damages the commissioners shall take into consideration the *advantages as well as the disadvantages of the road to such persons.*"

A State road was opened in Platte county, Missouri. Commissioners were appointed by the county court. They viewed the route for the proposed road and assessed damages to Mr. Newby. He was dissatisfied and appealed the case to the Circuit Court where the case was tried *de novo.* A jury was waived. One acre and a half of land was taken, worth $15 per acre. Newby asked an instruction to the effect that he was "entitled to the value of the land taken for the road and that the advantages of the road to him could not be set off against his claim for the value of the land." This was refused, and the court decided that the plaintiff Newby was not entitled to any money compensation for the land taken for the public use.

Speaking of the clause in the Missouri Constitution about taking private property for public use the court says (25 Mo. 262):

"The questions, therefore, that have been discussed in the courts in the construction of this clause—which is to be found in almost every American Constitution—are what is a public use within the meaning of this provision, and what is the just compensation required by the Constitution? Must it be the whole money value of the property without any deduction? Or is it competent for the legislature to provide that the increased value imparted to the residue of the party's land by the use to which the part taken is applied shall be deducted from the compensation to be paid? And the last is the question involved in the present case."

"When part is taken, just compensation includes damages to the remainder. Upon this point there is entire unanimity of opinion."

> Lewis, on Eminent Domain, Second Edition (A. D. 1900), vol. 2, page 998, sec. 464.

Newby vs. Platte Co., 25 Mo. 258 at 264, the court says:

"The government, however, possesses other powers over private property besides the right of eminent domain; and if in the exercise of the taxing power, the government may lawfully require the adjacent land owners to contribute towards paying for the right of way in proportion to the benefit each will derive from the road, the present enactment, so far as it directs the advantages of the road, to be deducted from the price of the land, must perhaps be considered as an exercise of the taxing power."

Then the court says here is an exercise of both powers in the same case. First—The power of eminent domain, whereby court and jury ascertain the value of the property taken and damages, if any, to the remaining land, and then court and jury ascertain if there are any benefits to the remaining land, and if so, how much. Here again court and jury act judicially. This law authorizing court and jury to ascertain if there are any benefits, how much, and deduct the amount from the compensation is a tax law and the process is taxation.

But here another difficulty appears. The Constitution of Missouri provides that—

"All property subject to taxation shall be taxed in proportion to its value."

The objection urged was here property is taxed, but is not taxed in proportion to its value, but in proportion to benefits.

The answer was, this is not a tax on property; it is a tax on benefits. "The question is as to the constitutional validity of taxes imposed by a subordinate authority in the state upon an arbitrary district of country in proportion not to the value of the property, but to the benefit to be derived by the owner from the improvement."

Again, page 272, says the court:

"But we cannot suppose it was the intention of the people of this state to suppress entirely that large class of assessments, felt to be so just and equitable and which for that reason had been introduced so generally into practice, in which each is required to contribute to the burden in proportion to the benefit he derives from the expenditure. When the taxation is against one in respect to his property as property when he is assessed for a property tax, the assessment must be according to the assessed value of the taxed property, but here the property is assessed in respect to the benefit he derives from the improvement. *It is a tax on the benefits rather than a tax on the property, and therefore is not obnoxious to the constitutional prohibition we are now considering.*"

Garrett vs. St. Louis, 25 Mo. 505. Garrett owned land; part was condemned for public use, leaving part of his land. The jury assessed the land taken at $768.45 and the buildings at $1,440, making in the aggregate $2,208.45. The jury assessed his remaining land with a benefit of $763. Garrett wanted the $2,208.45 due him. The city refused to pay unless this $763 benefit is deducted. Page 511 "the phrases" "benefits" and "increased value" may therefore be regarded as convertible terms; and if the constitutional provision referred to is to be considered as applicable to this kind of taxation, *it would seem that the spirit, if not the very letter, of its injunctions has been embodied in the act. The tax is exactly proportioned according to the increased value of the lot, which is the same thing as the value of the "benefit" which the owner receives from the improvement.* As property is taxed according to value, so benefits are taxed according to value. As we tax property according to value of the property, so we tax benefits according to value of the benefit.

Newby vs. Platte, 25 Mo. 258 at 264:

"This is, indeed, nothing more in effect than the exercise of both powers of government in the same breath—that of taking the land by the right of eminent domain, and of requiring, under the taxing power, the adjacent land owners to contribute to the cost of it in proportion to the benefit each will derive from the road."

The earlier cases in Missouri proceeded on the theory of Norwood vs. Baker, i. e., that the land is taken to the extent of the assessment levied on it and that to the extent of the excess of the cost of the work over and above any special and peculiar benefits, the land is taken for public use without just compensation.

The earlier cases came up on road laws and condemnations.

Newby vs. Platte County, 25 Mo. 258.
Walter vs. Warner, 25 Mo. 277.
Garrett vs. St. Louis, 25 Mo. 505.
North Missouri Railroad Company vs. Lackland, 25 Mo. 515.
Louisiana and Frankfort Plank Road Co. vs. Pickett, 25 Mo. 535.
North Missouri Railroad Co. vs. Gott, 25 Mo. 540.
Pacific Railroad vs. Chrystal, 25 Mo. 544.
Inhabitants of Palmyra vs. Morton, 25 Mo. 593.

All the above cases except the last are condemnation cases.

In all these cases the courts act judicially in ascertaining "just compensation," and not as a special tribunal.

North Missouri Railroad Company vs. Lackland, 25 Mo. 515 at 526.

The "advantages" spoken of in Newby vs. Platte Co. 25 Mo. 258, and the benefits spoken of in the St. Louis charter, in Garrett vs. St. Louis, must have "some limit." The benefits, or advantages, are limited to special peculiar exceptive benefits, and if not so limited the road law in contest in Newby vs. Platte County, and St. Louis charter in contest in Garrett vs. St. Louis are in violation of the Constitution of the State, as taking private property for public use without just compensation.

In Pacific Railroad vs. Chrystal, 25 Mo. 544 at 546, this instruction was given below:

"That said commissioners, in forming their estimate, make due allowance or deduction for any advantages or benefits which the said William Chrystal will derive from the said Pacific railroad, but not allowing him the benefit of any rise in land in consequence of the survey." Says the court:

"In the case of Newby vs. Platte County (ante p. 258, this court held that 'The benefits to be charged the land owners whose lands are taken for a railroad and deducted from the compensation to be allowed for the value of the land taken and the injury resulting to other adjoining land, must be the direct and peculiar benefits which result to them in particular, and not the general benefits they derive in common with other land owners in the vicinity from the building of the road.'" Continuing, the court says:

"The value of the land taken means its actual value independent of the road. The disadvantages spoken of by the act are the injuries arising from the taking of only a part of a tract which, from a variety of causes, may more or less impair the value of the part left, or entirely destroy its value." It is manifest that the order of the court to the commissioners did not conform to these principles. The judgment is reversed for this reason.

State Ex Rel. vs. St. Louis, 62 Mo. 244 at 246, says the court: "The most serious objection which has ever arisen in my own mind to some of the conclusions reached in the foregoing cases (Newby vs. Platte County, Walter vs. Warner and Garrett vs. St. Louis) is, that under, and in accordance with them, by a blended exercise of the taxing power and the right of eminent domain, the taxing power *may be so used as to impair, if not destroy, some of those rights to which the property owner is entitled under a constitutional exercise of the right of eminent domain.*"

The Supreme Court of Missouri has gone further in condemnation cases, and (under a law requiring court and jury to ascertain the actual value of the property taken and damages to property not taken, making one sum, and then ascertaining the amount of benefit to the public in general, and, second, the benefit to each piece of property) held that if the benefits to the public added to the benefits to individuals be less than damages assessed, then no condemnation can be had under such law for the reason that private property will be thereby taken for public use without just compensation, either in deducting something from the just compensation or in selling the benefited land for a sum exceeding the benefits, and to such excess taking the land assessed for public use without just compensation to the extent of the excess above actual benefits.

Tyler vs. St. Louis, 56 Mo. 60 at 63 bottom, 64 bottom.
City of Kansas vs. Baird, 98 Mo. 215 at 220-1.

This is common knowledge at the bar. The juries are so instructed.

Other courts have held the front foot rule invalid on constitutional objections of inequality of burdens, but all are on same basis, as in Norwood vs. Baker.

Peary vs. Little Rock, 32 Ark. 31.
McBean vs. Chandler, 9 Heiskil 349.
City of Lexington vs. McQuillin's heirs, 9 Dana 513.

On this question of taxation of benefits or for benefits from the admission of the State up to 1868, the time of the adoption of the Fourteenth Amendment, I have not been able to find in the courts of Missouri any other cases on this subject except the following, nine cases being in 25 Mo. as follows:

Newby vs. Platte County, 25 Mo. 258.
Walther vs. Warner, 277. (A judgment and execution is not compensation.)
Garrett vs. St. Louis, 25 Mo. 505.
North Missouri Railroad vs. Lackland, 25 Mo. 515.
Same vs. Regnal, 25 Mo. 534.
Louisiana and Frankford Plank Road Co. vs. Pickett, 25 Mo. 535.
North Missouri Railroad Company vs. Gott, 25 Mo. 540.
Pacific R. R. vs. Chrystal, 25 Mo. 544.
Inhabitants of Palmyra vs. Morton, 25 Mo. 593.
Egyptian Levee Company vs. Hardin, 27 Mo. 495.
City of St. Joseph vs. Anthony, 30 Mo. 541-2.
City of St. Joseph vs. O'Donoghue, 31 Mo. 345.
Powell vs. St. Joseph, 31 Mo. 347.
Risley vs. St. Louis, 34 Mo. 404.
City of St. Louis vs. Hardy, 35 Mo. 261.
City of St. Louis vs. Creamer, 36 Mo. 467.
City of St. Louis vs. Oeters, 36 Mo. 456.
City of St. Louis vs. Clemons, 36 Mo. 467.
City of St. Louis to use of Lohrum vs. Coons, 37 Mo. 44.

Fowler vs. St. Joseph, 37 Mo. 228.
Carondelet vs. Pickett, 38 Mo. 125.
City to use vs. Armstrong, 38 Mo. 29.
City to use vs. Armstrong, 38 Mo. 167.
Columbia Bottom Levee Company vs. Meier, 39 Mo. 53.
Abbott vs. Lindenbower, 42 Mo. 162.

Of the nine cases reported in 25 Mo. all except one are condemnation cases wherein court and jury determine the value of the land and damages to remaining land, if any, and then *court and jury ascertain what are the advantages or benefits to the adjoining land, how much, if any, are these advantages, under the instruction of the court, that the advantages or benefits they are to consider are the advantages or benefits specially and peculiarly belonging to the property, and not shared by other property in the neighborhood. They do this so as not to take for public use (by this power of taxation) without just compensation, either the land or its exact equivalent, "just compensation."*

A statute in Missouri authorizing a levy of local taxes of the kind in suit on abutting property according to frontage on the street paved to pay the cost of such paving, is void if it authorize a personal judgment or the distraint or sale of property other than that taxed, or if it create any other liability than an impost on the property itself.

Such a law, although a law for local taxation, and although not expressly authorized in the state constitution, nor expressly prohibited in terms by the state constitution of Missouri, is yet restrained and controlled by the express provision of the state constitution that "Private property shall not be taken (or damaged) for public use without just compensation."

Neenan vs. Smith, 50 Mo. 525 at 529 and 530.
City of St. Louis to use of Seibert vs. Allen, 53 Mo. 44 at 50-1-2-3-4-5-6-7. (A tax-bill for street paving). A leading case followed and approved in Carlin vs. Cavender, 56 Mo. 286 at 289.
St. Louis to use vs. Bressler, 56 Mo. 350 at 351.
Straesheim vs. Jerman, 56 Mo. 104 at 106—bottom of page.

Seibert vs. Allen, 61 Mo. 482 at 488—near mi
of page.

City of Louisiana vs. Miller, 66 Mo. 467.

Higgins vs. Ausmus, 77 Mo. 351 at 353.

Inhabitants of the Village of Hustonia vs. Gru
80 Mo. Appeals 433 at 436—lower two-third
page.

City of Pleasant Hill vs. Dasher, 120 Mo. 67
679 and 680.

The City of Clinton to use of Thornton et al.
Henry County, 115 Mo. 557 at 569 and 570.

Seibert vs. Copp, 62 Mo. 182 at 186-7.

The State Ex Rel. vs. Angert, 127 Mo. 456 at
—near bottom of page—page 463, top.

Stadler Admx. vs. Roth, 59 Mo. 400 at 401, b
tom, and 402, top. (Neenan vs. Smith has ov
thrown all statute laws of Missouri on spe
tax-bills.)

Syenite Granite Co. vs. Bobb et al., 37 Mo. A
peals 483, at bottom page 485, top 486.

Zoeller vs. Kellogg, 4 Mo. Appeals 163 at 164
6-7-8.

The Supreme Court of Missouri has gone further a
held that the legislature of the state cannot authorize t
local government of the towns and cities in Missouri
tax persons or property or occupations outside the tow
or city limits; that such taxation is a taking under t
guise of taxation of private property for *private* us
against an implied prohibition in the state constitution
do so.

Wells vs. Weston, 22 Mo. 384 at 388-9 and 390-1.

City of St. Charles vs. Nolle, 51 Mo. 122 at 124-5-

The Town of Cameron vs. Stephenson, 69 Mo. 37
at 378-9.

The State vs. Addington, 12 Mo. Appeals 214 a
221, top of page; affirmed in 77 Mo. 110 at 11
beginning of opinion.

Dickey vs. Tennison, 27 Mo. 373 at 374-5-6.

We ask your attention to a few of these cases.

Neenan vs. Smith, 50 Mo. 525 at 529 and 530.

This was a suit on special tax-bills for macadamizin
Frederick Avenue in St. Joseph, Mo. The question cam

up on the construction of a statute. Plaintiff obtained judgment below against the defendant personally and also enforcing a lien on the lot. The court distinguishes this particular kind of taxation and says, p. 528, at bottom:

"There is a broad distinction, and one of universal recognition, between the foundation upon which is based the right of general taxation for governmental purposes and that which supports the rights of local assessments. The authority to impose either is referred to the taxing power; but the object of one, as giving the authority, widely differs from that of the other."

All taxation is supposed to be for the benefit of the person taxed. That for raising a general revenue is imposed primarily for his protection as a member of society, both in his person and property in general, and hence the amount assessed is against him, to be charged upon his property, and may be collected of him personally. But, on the other hand, local taxes for local improvement are merely assessments upon the property benefited by such improvements, and to pay for the benefits which they are supposed to confer; the lots are increased in value, or better adapted to the uses of town lots, by the improvements.

Upon no other ground will such partial taxation for a moment stand.

Other property held by the owner is affected by the improvement precisely and only as is the property of all other members of the community, and there is no reason why it should be made to contribute, that does not apply equally to that of all others.

The sole object, then, of a local tax being to benefit local property, it should be a charge upon that property only, and not a general one upon the owner. *The latter, indeed, is not what is understood by a local or special assessment, but the very term would confine it to the property in the locality; for, if the owner is personally liable, it is not only not a local assessment, but also a general one as against the owner.* The reasonableness of this restriction will appear when we reflect that there is no call for a general execution until the property charged is exhausted. If that is all sold to pay the assessment, leaving a balance to be collected otherwise, we should have the legal anomally—the monstrous injustice—of not only wholly absorbing the property supposed to be benefited and rendered more valuable by the improvement, but also of entailing upon the owner the loss of his other property."

Then, after stating that certain cases were overruled, the court says, p. 530:

"The construction given above is not only more reasonable, but I greatly doubt *whether the legislature has the power to authorize a general charge upon the owner of local property which may be assessed for its especial benefit, unless the owners of all taxable property are equally charged.* As to all property not to be so specially benefited, he stands on the same footing with others; he has precisely the same interest, and should be subject to no greater burdens."

"When such burden is sought to be imposed on lands not in themselves constituting a political subdivision of the state, we at once approach the line which is the boundary between acts of taxation and acts of confiscation." Norwood vs. Baker, 172 U. S. at 282-3. In the Missouri case quoted from, it is not stated what special provision of the Missouri constitution is violated. That is stated in the case of The City of St. Louis to use of Seibert vs. Allen, 53 Mo. 44.

This was a suit on two tax-bills for paving a street in St. Louis. The authority of the city council may be found in Missouri Laws (Session Acts) 1865-6, p. 295, secs. 10 and 11, Session Acts 1867, pp. 73-4. The charge is to be made "in proportion to the frontage." The work was done in front of Allen's property on the Gravois road in St. Louis, Missouri. A personal judgment had been rendered in the lower court and the question was on the constitutional validity of the statutes authorizing such personal judgment.

Says the court, p. 50:

"It is contended by the respondent, that this question has been directly settled by this court by various decisions heretofore rendered, and that said question has also been settled by the adjudged cases in other States."

This is the whole reasoning in the first case in Missouri, and in this one at bar.

Inhabitants of Palmyra vs. Morton, 25 Mo., 593 at 595, bottom half of page.

"The subject has been thoroughly discussed, and every principle bearing on it severely analyzed, in almost every State of the Union where the power has been exercised; and it is now as firmly established as any other doctrine of American law."

Continuing, p. 50, the Supreme Court of Missouri says:

"Several cases are referred to where personal judgments have been rendered upon assessments, which are contended to be identical in their legal effect with the ones sued on in this case."

"In the case of the City of St. Louis to the use of McGrath vs. Clemens, 36 Mo. 467, it is certainly held by the court, that a personal judgment is proper in a case like the one under consideration; but the point made in that case was not whether the legislature had the constitutional power to authorize a municipal corporation to make local improvements in their territorial limits, and charge the cost thereof to the adjoining lots or land, and make the owners of such land or lots personally liable to pay for said improvements, on account of any supposed benefit that the improvements might be to the property, and then by a general personal judgment against the owner of the lot sell not only the lot or lands against which the assessment was made, and which was supposed to be benefited, but also any other property of the owner to pay the judgment; but the point raised and decided in that case was, whether under the state of the pleadings in that case a general personal judgment could be rendered, or whether, by the language of the statute and ordinances under which the work was done, a personal judgment could be rendered against the owner of the lots charged with the assessment. The constitutional power to authorize the rendition of a personal judgment in such case was not considered or argued, and the same may be said as to the cases of the City of St. Louis to the use of Lohrum vs. Coons, 37 Mo. 44; Fowler vs. City of St. Joseph, 37 Mo. 228, and The Inhabitants of Palmyra vs. Morton, 25 Mo. 593. In none of these cases, nor in any other case in this state, was the constitutional power to make these local improvements, and assess the cost against the adjoining property, and then recover a personal judgment against the owner of the property for the amount assessed, ever brought directly in question or discussed." The court then refers to the different constitutional provisions in different states in authorizing "taxes" and "assessments," and the court quotes approvingly from Taylor vs. Palmer, 31 Cal. 240, thus:

P. 53, bottom. "In Emery vs. Bradford, 29 Cal. 88, we held that a personal judgment was authorized by the statute, but whether the statute was in that respect constitutional was not considered. Be that as it may, it is clear that it was not decided."

"*To say that the owner of land bordering upon an improved street can be made personally responsible for the payment of the improvement*, is equivalent to saying *that his entire estate, real, personal and mixed, whether bordering upon the street or remote from it, whether benefited or not, shall be held responsible for the tax.*"

"It is well settled by the decisions of this court that assessments like those sued on are not regarded as a tax, but as an assessment for improvements, and are not considered as a burden, but as an equivalent or compensation for the enhanced value which the property derived from the improvement."

Quoting from Carondelet to the use vs. Picot, 38 Mo. 125, this language:

"The city has a lien on the property, the contractor has not. It may be said that the property may not be sufficient to pay the assessment, it is a sufficient answer to this to say that it will not be presumed, that it was ever intended that a corporation in the exercise of this high prerogative power *should absorb the whole value of a person's property, and then come on him for the deficit.*"

"The very idea of such an assumption on the part of either the city or the state legislature would be sufficient to startle one who had even the most crude notion of the objects and purposes of a just and enlightened government. The idea that a city could improve a street and assess the property benefited thereby, and sell the entire property, and then go on the owner of the property, who may reside out of the city, and sell his property there to pay the balance of the assessment, and this all in consideration of the benefit conferred on his property, which was already sold, would seem at least in its results like taking the property of the owner and converting it to public use without any just compensation. I do not believe that by this indirection you can do that which is forbidden by the constitution if directly done. If a personal judgment can be rendered in such case, all this may happen. It is true, it is not likely to happen, but the fact that it *MAY POSSIBLY* happen is enough to condemn the law."

"If you can assess the lot of a non-resident of the city for improvements made in one of the streets in the vicinity of the lot, and sue the owner of the lot, get a personal judgment, sell the lot for less than the amount of the judgment, and collect the balance from the owner out of the other property without the city limits, you have in such case *certainly taken his property and converted it to the use of the city, and if he has in such case received any just compensation it is difficult to perceive it. This would enable the city to do that by an indirection, which could not be done directly. If we construe the statute in reference to these assessments to authorize a personal judgment, by which such results might follow, it would make the statute unconstitutional and void.*"

Then the court quotes from Neenan vs. Smith, 50 Mo., quoted before in this brief, page 42.

This St. Louis tax law for macadamizing Gratiot street in St. Louis, allowing a personal judgment against the owner, is in contravention of that section of the Missouri constitution which provides that—

"Private property shall not be taken for public use without just compensation."

To say that the owner is personally liable is equivalent to saying "That his entire estate, real, personal and mixed, whether bordering upon the street or remote from it, whether benefited or not, shall be held responsible for the tax."

Property remote from the street, not benefited, cannot be sold. The reason intimated, or given, is that to do so would violate the rule of constitutional law, that "Private property shall not be taken for public use without just compensation."

Property bordering on the street, not benefited, ought not to be sold. "The idea * * * * (personal liability), would seem at least in its results like taking the property of the owner and converting it to public use without any just compensation."

City of St. Louis vs. Allen, 53 Mo. at 55.

To sell abutting property not benefited "would seem at least in its results, like taking the property of the owner and converting it to public use without any just compensation."

In Higgins vs. Ausmus, 77 Mo. 351: Mr. Higgins owned a lot in Linneus, in Linn county, Missouri. The sidewalk in front of it needed repairs which were made by the city authorities and taxed to the abutting property belonging to Mr. Higgins. All his taxes were delinquent. The tax-book was in the hands of Ausmus, as county collector. This tax-book was authority to seize and sell personal property to pay general taxes. Mr. Higgins paid all taxes except this sidewalk tax. He denied the validity of this tax. Mr. Ausmus, the collector, levied on some stoves belonging to Mr. Higgins. Mr. Higgins replevied the stoves before a justice of the peace. He was successful there and on appeal in the Circuit Court, and again in the Supreme Court of Missouri. The Supreme Court hold that the tax-book conferred no authority and could confer no authority to take or sell the stoves. He must look alone to the land. To sell the stoves would be taking them for public use without just compensation. While the court does not say this in terms, this is the necessary result of the decision. (Page 353, top half of page.)

City of Pleasant Hill vs. Dasher, 120 Mo. 675, was a suit begun before a justice of the peace to collect $19.23 for labor done and material furnished in building a plank sidewalk along a street in front of two lots owned by defendant, Charles W. Dasher. The case went to the Circuit Court on appeal where defendant had judgment, and on appeal to the Supreme Court of Missouri the judgment was affirmed.

In rendering the opinion, Black, Judge, said:

"The claim made by the city in the Circuit Court and repeated here is this: That the city was entitled to a personal judgment against the defendant for the work done and materials furnished in the construction of the sidewalk, and this claim stands on the eleventh section of the charter."

As similar statutes were so very common and they were all so completely overthrown by the Supreme Court of Missouri in City of St. Louis to use vs. Allen, 53 Mo. 44, that we copy the section eleven referred to. (120 Mo. 675 at page 678, fifth line from the top.)

"The council shall have power to cause the owners or occupiers of real estate to pave and repair sidewalks adjacent to the property which they may own or occupy; and if any such owner or occupier shall fail to pave or repair the same, as required by ordinance, the council may cause the same to be done, and may recover the full expense thereof by an action of debt in the name of the corporation."

The court says, p. 679, eight line from top:

"The defendant insists: First, Said eleventh section is unconstitutional and void; second, it was repealed by the Act of 1887; and third, the justice had no jurisdiction of this action." After comparing the two Acts, the one giving a personal liability, the other merely a lien, the court proceeds:

"In short, does the Act of 1887 repeal section 11 of the charter? In disposing of this question it is well to bear in mind the former adjudications of this court. Neenan vs. Smith, 50 Mo. 528, was an action to collect tax-bills for macadamizing a street. It was held that plaintiff was not entitled to a general judgment against the owner of the land, and doubt was expressed whether the legislature had the power to authorize a general judgment in such cases. The authorities on this question were reviewed in the subsequent case of St. Louis to use vs. Allen, 53 Mo. 44, and it was held in clear and distinct terms that the legislature had no such power to authorize a personal judgment against the property owner in suits to recover these local assessments. The ruling made in that case has been approved in a number of subsequent cases." * * *

"The Act of 1887 was no doubt passed in view of what was said by this court in the case of the City of St.

Louis to use vs. Allen, supra, and repeated in subsequent cases."

These three cases—City of St. Louis to use vs. Allen, 53 Mo. 44; Higgins vs. Ausmus, 77 Mo. 351, and City of Pleasant Hill vs. Dasher, 120 Mo. 675—have rendered void nearly all special tax laws in the state. Personal liability was generally the statute rule in this (Missouri) country from 1807 to 1889.

Laws of Louisiana Territory, part 1, page 259, sec. 5—(A. D. 1807).
Geyer's Digest (A. D. 1818), p. 418, sec. 5.
Revised Statutes of 1825, vol. 2, p. 766, sec. 5.
Revised Statutes, 1835, p. 602, sec. 7.
Revised Statutes, A. D. 1845, p. 1050, sec. 9.
Revised Statutes, A. D. 1855, vol. 2, p. 1526, sec. 7, and sec. 12, p. 1527.

Action of debt is now a "civil action."

General Statutes, 1865, p. 242, secs. 12-13-14-15.
Revised Statutes, 1879, vol. 2, p. 995, sec. 5015.
Personal liability abandoned first in statutes of Missouri, 1899, vol. 2, p. 1411, secs. 6015-6—and a lien only given.
Revised Statutes of Missouri, 1889, vol. 1, p. 464, sec. 1677.

St Louis charter (laws of Missouri, 1822-3, p. 42, sec. 13), "Levy a tax *on the holders* of lots" for paving the street. How could this statute be now enforced? There are these difficulties in the way. This paving tax in St. Louis in 1822-3 was not a lien on the property, because the statute of its creation did not make it a lien. They could not sue for the tax. There was no authority for that, and if the city could sue she could get no personal judgment. She could not distrain and sell personal property, for that would have been contrary to the doctrine of Higgins vs. Ausmus, 77 Mo. 351. Apply this doctrine enunciated in these three cases—City of St. Louis vs. Allen, Higgins vs. Ausmus and City of Pleasant Hill vs. Dasher—to the law in Inhabitants of Palmyra vs. Morton, 25 Mo. 593. The statute is quoted in the opinion thus:

The tenth section gives them power "To have the footways and sidewalks of streets paved at the expense of the owners and occupiers of the adjacent lots; and if such owner or occupier fail to pave the same, as directed by ordinances, said trustees shall pave the same and recover the full expense thereof from such owner or occupier by action of debt."

Now, how will be the decision of the Missouri Supreme Court? A personal judgment cannot be rendered; that would take private property for public use without just compensation. There is no lien on the property because the statute gives none. At general common law, where a public highway is improved in front of and immediately adjoining private property, if the private property is damaged, the owner cannot recover the damages, and if the work is a benefit the public cannot recover for the benefit conferred. There could be no recovery at general common law.

In Missouri prior to A. D. 1855, we had few or no exemptions, and imprisonment for debt was the rule.

- Laws of Louisiana Territory, Part I, pp. 115-6, secs. 42-3 (A. D. 1807).
- Geyer's Digest (1818) p. 256, secs. 61 and 63.
- Revised Statutes of Mo. (A. D. 1825), Vol. 1, p. 363, sec. 2.
- Revised Statutes of Mo. (1835) p. 253, secs. 2, 3 and 5.
- Revised Statutes of Mo. (1845) p. 574, sec. 1.

Imprisonment for debt abolished November 17th, 1855. See Revised Statutes 1855, Vol. 1, p. 853, sec. 1.

With imprisonment for debt in force and with little or no exemptions in force, there was no necessity for a special lien on the particular real estate. The general judgment and execution took all the party had and all he afterward acquired until the statute liability was paid.

An action of debt was allowed in the charters of most Missouri towns and cities. (See Acts 1832-3, p. 104, secs. 3 and 4.) The remedy was, first, sell goods; second, action of debt; third, collect rents; fourth, sell the land. This is the charter of St. Charles, Missouri. Session Acts 1836-7, p. 308, secs. 8 and 10, similar law in all respects.

The earlier laws of Missouri did not conform to modern ideas of the constitutional rights of the citizen.

In opening roads if the owner refused to dedicate the law instructed the commissioners appointed to assess damages thus: "And provided, also, that nothing shal be allowed to any person or persons, where such road passes through his or their unimproved lands."

> Geyer's Digest, A. D. 1818, pp. 354-5, copied from Laws of Missouri Ter. 1813, p. 71.
> Rev. Stat. of Mo. A. D. 1825, Vol. II, chap. 1.
> Roads and Highways, p. 688, sec. 3, on p. 689 bottom, and top 690, same language.

In the City of St. Louis to the use of Seibert vs. Allen, 53 Mo. 44, the Supreme Court of Missouri say that if a general judgment be allowed, a general exemption may be issued, the benefited property may be sold and then other property remote from the street not benefited may be sold, this remote property not benefited will be taken for public use without just compensation.

The Court say: "But the fact that it may possibly happen is sufficient to defeat the law."

This is general law. We test the constitutional validity of a statute by what may be done under it, not what has occurred.

Stuart vs. Palmer, 74 N. Y. 188, Earl, Judge, rendering the opinion said: "It matters not upon the question of the constitutionality of such a law, that the assessment has, in fact, been fairly apportioned. The constitutional validity of law is to be tested, not by what has been done under it, but what may, by its authority be done." This language is quoted with approval in Gilman vs. Tucker, 128 N. Y. 190 at 200.

> Colon vs. Lisk, 157 N. Y. 188 at 194-5.

"In discussing the constitutionality of this Act, it is to be remembered that the question is to be determined not by what has been done under it in any particular instance, but by what may be done under and by virtue of its authority."

> Stuart vs. Palmer, 74 N. Y. 183.
> Gilman vs. Tucker, 128 N. Y. 190-200.
> Brown vs. City of Denver, 7 Col. 305 at 312.

Dexter vs. City of Boston, Supreme Judicial Court of Massachusetts, Suffolk, May 22, 1900. North East Reporter, Vol. 57, No. 5, June 15, 1900, page 379 at 380.
Collins vs. New Hampshire, 171 U. S. 33, 34.
Henderson vs. Major, 92 U. S. 268.
Minnesota vs. Barber, 136 U. S. 313 at 319.

It is said that the case of Norwood vs. Baker is inconsistent with other decisions of the Supreme Court of the United States, and the cases of Davidson vs. New Orleans, 96 U. S. 97; Waltson vs. Nevin, 128 U. S. 578; Spencer vs. Merchant, 125 U. S. 345; Stanley vs. Supervisors, 121 U. S. 535; Mobile vs. Kimball, 102 U. S. 691; Hager vs. Reclamation District, 111 U. S. 701; United States vs. Memphis, 97 U. S. 284; Laramie Co. vs. Albany Co., 92 U. S. 307; Wurtz vs. Hoagland, 114 U. S. 606; Railroad vs. Richmond, 96 U. S. 521; Hallbrook Irrigation District vs. Bradley, 164 U. S. 112, and Parsons vs. Columbia, 170 U. S. 56-7 are cited.

In Davidson vs. New Orleans, supra, the language of the court is as follows:

"That whenever by the laws of a state, or by state authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be for the whole state or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections.

"It may violate some provision of the State constitution against unequal taxation; but the Federal constitution imposes no restraints on the states in that regard. If private property be taken for public uses without just compensation, it must be remembered that when the fourteenth amendment was adopted the provision on that subject, in immediate juxtaposition in the fifth amendment with the one we are construing, was left out, and this was taken. It may possibly violate some of those principles of general constitutional law, of which we could tak jurisdiction if we were sitting in review of a Circui Court of the United States, as we were in Loan Association vs. Topeka, 20 Wall, 655. But, however this ma be, or under whatever other clause of the Federal constitution we may revive the case, it is not possible to hol that a party has, without due process of law, been de prived of his property, when, as regards the issues affect ing it, he has, by the laws of the state, a fair trial in court of justice, according to the mode of proceeding ap plicable to such a case. This was clearly stated by thi court, speaking by the Chief Justice, in Kennard vs. Mor gan, 92 U. S. 4800, and, in substance, repeated at th present term, in McMillan vs. Anderson, 95 id 37."

In Walston vs. Nevin, supra, this language is repeat ed, and it is the ground of the decision on that question.

In Kennard vs. Morgan, 92 U. S. 480, cited as au thority for this doctrine, the question was whether Kim ball had been deprived of his office without due process o law. The court said:

"The question before us is not whether the court below having jurisdiction of the case and the parties hav followed the law, but whether the law, if followed, woul have furnished Kennard the protection guaranteed by th constitution. * * * From this it appears that ampl provision has been made for the trial of the contestatio before a court of competent jurisdiction; for bringing th party against whom the proceeding is had before th court, and notifying him of the case he is required t meet; for giving him an opportunity to be heard in hi defense; for the deliberation and judgment of the court for an appeal from this judgment to the highest court o the state, and for hearing and judgment there. A mer statement of the facts carried with it a complete answe to all the constitutional objections urged against th validity of the act."

The substance of the decision in McMillan vs. Ander son, 95 U. S. 37, also cited in the above opinion, is fairl given in the head note of the case:

"A statute which gives a person against whom taxe are assessed a right to enjoin their collection and hav their validity judicially determined, is due process of law notwithstanding he is required, as in other injunction cases, to give security in advance."

The effect of these decisions extends only to the proposition that the regular proceedings, upon due notice, in a court of competent jurisdiction, constitute due process of law.

Spencer vs. Merchant, 125 U. S. 345, is a case still more frequently and earnestly insisted on as being inconsistent with the doctrine of the Norwood case, but when that case is fairly examined it will be seen that it stands upon the precise ground upon which the cases of Davidson vs. New Orleans and Kennard vs. Morgan were decided. The court, in its opinion, quotes the decision of the New York Court of Appeals in the case.

The portion cited is as follows:

"These views furnish also an answer to the objection that the only hearing given to the land-owner relates to the apportionment of the fixed amount among the lots assessed, and none is given as to the aggregate to be collected. No hearing would open the discretion of the legislature, or be of any avail to review or change it. A hearing is given by the act as to the apportionment among the land-owners, which furnishes to them an opportunity to raise all pertinent and available questions, and dispute their liability, or its amount and extent. The precise wrong of which complaint is made appears to be that the land-owners now assessed never had opportunity to be heard as to the original apportionment, and find themselves now practically bound by it as between their lots and those of the owners who paid. But that objection becomes a criticism upon the action of the legislature and the process by which it determined the amount to be raised and the property to be assessed. Unless by special permission, that is a hearing never granted in the process of taxation. The legislature determines expenditures and amounts to be raised for their payment, the whole discussion and all questions of prudence and propriety and justice being confided to its jurisdiction. It may err, but the courts cannot review its discretion. In this case it kept within its power when it fixed, first, the amount to be raised to discharge the improvement debt incurred by its direction; and, second, when it designated the lots and property, which in its judgment, by reason of speci benefits, should bear the burden, and having the powe we cannot criticise the reasons or manner of its actio The land-owners were given a hearing, and so there wa no constitutional objection in that respect, Nor was tha hearing illusory. It opened to the land-owner an oppo tunity to assail the constitutional validityof the act unde which alone an apportionment could be made, and that ob jection failing, it opened the only other possible ques tions, of the mode and amounts of the apportionmen itself. We think the act was constitutional.'' 100 N. Y 587-589.

County of Mobile vs. Kimball, 102 U. S. 691.

A law of the state of Alabama had authorized th county of Mobile to issue bonds for the improvement o the river, bay and harbor of Mobile, and it was held tha this was not a taking of private property for public use within the meaning of the constitutional clause. Th facts were so entirely different, and the principles of lav in question were so far removed from those in questio here, that it would be useless to examine the case further

Stanley vs. Supervisors, 121 U. S. 535, 550.

The effect of the decision in this case, so far as i material, is sufficiently stated in the head-note, as follows

"When the statutes of a state provide a board fo the correction of errors and irregularities of assessor in the assessment of property for purposes of taxation the official action of that body is judicial in character and its judgments are not open to attack collaterally."

It will be seen that the doctrine of this case is identical with that of Davidson vs. New Orleans.

Laramie County vs. Albany County et al., 92 U. S 307, holds that unless the constitution of a state or th organic law of a territory otherwise prescribes, the legislature has the power to diminish or enlarge the area of a county whenever the public necessity or convenience requires, and nothing more.

In Fallbrook Irrigation District vs. Bradley, 16 U. S. 112, 169, the case was determined, so far as it is material to the present question, upon the ground tha the effect of the existence of the benefits had been judicially determined by the board of supervisors. It was said:

"The difference between this case and the case of Spencer vs. Merchant, 125 U. S. 345, is said by counsel for appellees to consist in the fact that in the Spencer case the lands in question might have been benefited, while here the additional benefit to land already capable of beneficial use without irrigation is in no legal or proper sense a benefit which can be considered for the purpose of an assessment. We think this alleged difference is not material. It is in each case one of degree only and the fact of the benefit is by the act to be determined after a hearing by the board of supervisors. In this case the board has necessarily decided that question in favor of the fact of benefits by retaining the lands in the district. Unless this court is prepared to review all questions of fact of this nature decided by a state tribunal, where the claim is made that the judgment was without any evidence to support it or was against the evidence, then we must be concluded by the judgment on such a question of fact, and treat the legal question as based upon the facts as found by the State board. Due process of law is not violated, and the equal protection of the laws is given, when the ordinary course is pursued in such proceedings for the assessment and collection of taxes that has been customarily followed in the State, and where the party who may subsequently be charged in his property has had a hearing or an opportunity for one provided by the statute."

Kelly vs. Pittsburg, 104 U. S. 78.

"In view of the finding of the board of supervisors on this question of benefits, assuming that there has been one, this court cannot say as a matter of law that the lands of the plaintiff in this case have not been or cannot be benefited by this proposed irrigation. There can be no doubt that the board of supervisors (if it have power to hear the question of benefits, as to which something will be said under another head of this discussion) would be a proper and sufficient tribunal to satisfy the constitutional requirement in such case."

Wurts vs. Hoagland, 114 U. S. 606.

The conclusion in this case is stated by Justice Gray, speaking for the court, as follows:

"As the statute is applicable to all lands of the same kind, and as no person can be assessed under it for the expense of drainage without notice and opportunity to be heard, the plaintiffs in error have neither been denied the equal protection of the laws, nor been deprived of their property without due process of law, within the meaning of the Fourteenth Amendment of the Constitution of the United States. Barbier vs. Connolly, 113 U. S. 27, 31; Walker vs. Sauvinet, 92 U. S. 90; Davidson vs. New Orleans, 96 U. S. 97; Hagar vs. Reclamation District, 111 U. S. 701."

R. R. Co. vs. Richmond, 96 U. S. 521, does not involve any tax or assessment of any kind, and is not in point.

It now becomes necessary to examine the case of Hagar vs. Reclamation District, 111 U. S. 701.

In this case swamp lands had been assessed for the purpose of reclamation.

The law of California provided for the appointment by the supervisors of three commissioners, "who are jointly to view and assess upon each acre to be reclaimed or benefited a tax proportionate to the whole expense, and to the benefits which will result from the works."

The ojection to the assessment in this case was that it was "made without notice to the defendant or without his being afforded any opportunity to be heard respecting it, the law authorizing it containing no provision for such notice or hearing."

It had been held by the courts in California that in a suit for the collection of such assessments, the defendant might set up any grievances he had, including any unfairness or inequality in the assessment of benefits. In other words, he might prove that the reclamation did not benefit him in the amount assessed, or did not benefit him at all, or that it was an injury to him. The court therefore decided that his property could not be taken without due process of law under that proceeding.

Under the laws of Missouri, however, and the decisions of the Missouri courts, it is settled that no such defense can be made; that when suit is brought to enforce the lien of the tax-bill upon the property assessed the defendant cannot show either that the property was not benefited to the amount assessed, or that it was not benefited at all, or that it was injured by the improvement for which it was assessed. Therefore, the precise ground upon which the case of Hagar vs. the Reclamation District was decided, does not exist in this case.

Judge Field, speaking for the court, says:

"In some States, instead of a board of revision or equalization the assessment may be revised by proceedings in the courts and be there corrected if erroneous, or set aside if invalid; or objections to the validity or amount of the assessment may be taken when the attempt is made to enforce it. In such cases all the opportunity is given to the taxpayer to be heard respecting the assessment which can be deemed essential to render the proceedings due process of law. In Davidson vs. New Orleans this court decided this precise point. In that case an assessment levied on certain real property in New Orleans for draining the swamps of that city was resisted on the ground that the proceeding deprived the owners of their property without due process of law, but the court refused to interfere, for the reason that the owners of the property had notice of the assessment and an opportunity to contest it in the courts. After stating that much misapprehension prevailed as to the meaning of the terms "due process of law," and that it would be difficult to give a definition that would be at once perspicuous and satisfactory, the court, speaking by Mr. Justice Miller, said that it would lay down the following proposition as applicable to the case." (That proposition is the one we have quoted in the case of Davidson vs. New Orleans.) "This decision covers the cases at bar. The assessment under consideration could, by the law of California, be enforced only by legal proceedings, and in them any defense going either to its validity or amount could be pleaded. In ordinary taxation assessments, if not altered by a board of revision or equalization, stand good, and the tax levied may be collected by a sale of the delinquent's property; but assessments in California, for the purpose of reclaiming overflowed and swamp lands, can be enforced only by suits, and, of course, to their validity it is essential that notice be given to the tax-payer and opportunity be afforded him to be heard respecting the assessment. In them he may set forth, by way of defense, all his grievances. Reclamation District No. 108 vs. Evans, 61 Cal. 104. If property taken upon an assessment, which can only be enforced in this way, be not taken by due process of law, then, as said by Mr. Justice Miller in the New Orleans case, these words as used in the Constitution, can have no definite meaning. The numerous decisions cited by counsel, some of which are given in the note, as to the necessity of notice and of an opportunity of being heard, are all satisfied where a hearing in court is thus allowed."

The case of Lent vs. Tillson, 140 U. S. 316, although not so frequently cited as being inconsistent with the decision in the Norwood case, is a similar case, and the opinion is so full upon the question of the necessity of notice and hearing, and also upon the weight and effect to be given to the decision of the Supreme Court in construing the effect of the law, that it is deserving of notice. In the course of the opinion, speaking by Mr. Justice Harlan, the court said:

"For any person interested, and who felt himself aggrieved by the action or determination of the board, as indicated by its report, was permitted at any time within the above thirty days, to apply by petition to the county court of the city and county, showing his interest in the proceedings of the board of commissioners, and his objections thereto, for an order that would bring before that court the report of the board, together with such pertinent documents or data as were in its custody, and were used in preparing its report."

After stating the powers and duty of the board of commissioners upon such petition, the court proceeds:

"Were not these provisions in substantial conformity with the requirements of 'due process of law,' as recognized in the decisions of this court?"

The court then cites the portions of the decisions in Davidson vs. New Orleans and Hagar vs. Reclamation District, which we have already cited, and then proceeds:

"These principles were reaffirmed in Kentucky Railroad Tax Cases, 115 U. S. 321, 331, and in Spencer vs.

Merchant, 125 U. S. 345, 355, in the latter of which cases it was said that 'the legislature, in the exercise of its power of taxation, has the right to direct the whole or part of the expense of a public improvement, such as the laying, grading or repairing (and, equally, the widening) of a street, to be assessed upon the owners of lands benefited thereby;' and that 'the determination of the territorial district which should be taxed for a local improvement is within the province of legislative discretion;' also, that, 'if the legislature provides for notice to and hearing of each proprietor, at some stage of the proceedings, upon the question what proportion of the tax shall be assessed upon his land, there is no taking of his property without due process of law.'

"Tested by these principles, the statute providing for the widening of Dupont street cannot be held to be repugnant to the constitutional requirement of due process of law. * * * * If we had any doubt of the correctness of these views, we should accept the interpretation which the highest court of the state places upon the statute. When the inquiry is whether a state enactment under which property is proposed to be taken for public purpose accords full opportunity to the owner, at some stage of the proceedings involving his property, to be heard as to their regularity or validity, we must assume that the inferior courts and tribunals of the state will give effect to such enactment as interpreted by the highest court of that state. The Supreme Court of California, speaking by Mr. Justice Temple, in this case, has said: 'We are not considering here a statute which is silent as to the hearing. The provisions in question were undoubtedly inserted in view of the constitutional requirement, and for the purpose of affording that opportunity to be heard, *without which the law would be void.* To give the statute the construction contended for would not only defeat the evident purpose, but would make the whole proceeding farcical. And, I must confess, it seems to me it requires great industry in going wrong, in view of all the circumstances, to conclude that such can be the meaning. Inapt words certainly are found in the section, but it would not have provided so elaborately for a thorough investigation for grievances if it were not intended that redress should be awarded. * * * * It is said that the county court was without power to adjudge the statute to be unconstitutional, and had no discretion, except to confirm the report, or to require it to be altered or modified. We do not perceive that this is a material inquiry, so long as the statute is not repugnant to the constitution. But we do not admit that the county court was without power to hold it to be unconstitutional and void—if such was its view—and to decline, upon that ground alone, to confirm any report that the board of commissioners might have filed. The judge or judges of that court were obliged, by their oath of office, and in fidelity to the supreme law of the land, to refuse to give effect to any statute that was repugnant to that law, anything in the statute or the constitution of the state to the contrary notwithstanding. Upon this subject, as well as in respect to the power of the county court to consider objections of every nature that might be made to the confirmation of any report from the board of county commissioners, the Supreme Court of the state said: 'The statute does not expressly authorize the court to pass upon the validity of the act, or whether the board of supervisors had passed the necessary resolution, or the notices had been given. But the power to do this is necessarily involved in the power of the court to act at all. It may be that the court could not pass upon these questions upon which its jurisdiction depended, so as to conclude all inquiry even on a collateral attack. It was a constitutional court, invested with jurisdiction by the constitution of special cases. The parties had full notice of the proceeding, and of their right to be heard. Again: 'The statute places no limit upon the objections which might be made by those deeming themselves aggrieved by the action or determination of the board as shown in the report. As all their determinations which could affect any person were required to appear in the report, this would seem to include all possible objections.' * * * * * They could have explained that a wrong basis was adopted in estimating damages or benefits; that the estimated cost was too much, or for any misconduct of the commissioners which could effect them, or that the cost exceeded the estimated benefits, and it does not seem to me that the court would have found any difficulty in granting relief.' 72 California, 404, 422."

As to the binding effect of the results of a hearing upon notice, and of the necessity of such hearing to make valid proceedings in similar cases, this decision is a very important one, as it is upon the further question as to the effect of a decision of the state court construing the statute and declaring whether or not such hearing is allowed under the law. In the case cited, the Supreme Court of California had decided that such a hearing could be had. In the present case, the Supreme Court of Missouri has authoritatively decided that there can be no hearing, and that no hearing is necessary. In fact, the law requiring the entire cost of the improvement to be levied upon the property fronting it, according to the front feet, forbids any hearing on the question as to the proper distribution of the assessment.

N. Y. & G. L. R. R. Co. vs. Kenney, 55 N. J. L. 463.
People vs. Jefferson County Court, 55 N. Y. 604 607.
Lee vs. Ruggles, 62 Ills. 427 at 431.
Creote vs. Chicago, 56 Ills. 422.
St. John vs. City, 50 Ills. 92-3-4-5-6.
Vreeland vs. Jersey City, 43 N. J. L. 135.

The Supreme Court of Missouri, on page 40 of printed record, in commenting on the case of Norwood vs. Baker, 172 U. S. 269, say:

"In the condemnation proceeding proper the jury assessed her compensation at $2,000, and that sum was paid her, and thereupon the village council assessed her with the $2,000 and all costs of the condemnation, amounting to $218.58 as benefits to her abutting property. The result being that the village acquired her land for nothing and charged her $218.58 for having deprived her of it." This is an error. She was paid for the land and now they propose to take $2,000 from her and charge her $218.58 for doing it and sell her land to pay the charge whether benefited or not. If Mrs. Baker's land was benefited $3,000, then it is a mistake to say "the village acquired her land for nothing and charged her $218.58 for having deprived her of it."

If the condemed land had belonged to another and in its condemnation the value had been assessed at $2,000.00

the case would not be different. The village of Norwood had paid $2,000 for land for the street and $218.58 for costs. It must raise this by a tax—both the costs, $218.58, and the principal sum of $2,000. If Mrs. Baker's abutting land, not benefited, is sold to pay for this street, what does she get, if she gets no benefit?

It is said that the case of Spencer vs. Merchant, 125 U. S. 345, is against the contention of the plaintiffs in error in this case. I cannot so understand the decision of the Supreme Court of New York on the majority opinion of this court, or even the minority opinion. Let me recount some of the salient facts in that case. Under the acts of the legislature of New York a street in the town of New Lots is opened. The owners of the land taken, and also owners of lands to be benefited, were parties to this suit in court, damages and benefits were assessed and paid. Then, under the 4th section of the Act of 1869, amended in 1870, the court appointed commissioners to assess the benefits for grading and paving the street. The commissioners were appointed, assessed the benefits and reported to the court and the court approved the report. The act did not require any notice, nor was any given to property owners. The total cost was $100,000, and after a large part had been paid the Court of Appeals held the assessment void, as reported in Stewart vs. Palmer, 74 N. Y.

The state of New York had paid for this whole work, and in 1881 an act was passed by her legislature to assess the remainder of cost and interest on the remaining lots, which had paid nothing.

In Spencer vs. Merchant, 125 U. S. at 352-3-4-5 is copied the opinion of the Court of Appeals of New York (100 N. Y. 587-8-9).

After reciting all that had been done the Supreme Court of New York say:

"We are not at liberty to say that the tax on the property covered by the law of 1881 was imposed without reference to special benefits." (Page 353, bottom half of page.)

The legislature is said to determine the lands benefited and the amount of benefit, but in that case it was not final on the property.

The Board of Supervision of King's county were to put upon the assessment roll of the Town of New Lots

"A sum equitably apportioned among the several parcels, etc., etc., equal to $55,653.52." Notice was to be given.

"And all parties interested in said lands shall be entitled to be heard before said board upon the question of said apportionment." A construction was put on the language of the statute of 1881. What is meant by "a sum equitably apportioned?" It is sometimes stated that this whole sum must be taxed on these lots whether benefited or not. It is said that the legislature had determined by the Act of 1881 that these lots were benefited to the amount of $55,653.52. If the legislature by the Act of 1881 made this determination and had authority to do so, then the courts can not interfere. Say the Supreme Court of New York, quoted in 125 U. S. at 354:

"A hearing is given by the Act as to the apportionment among the land-owners, which *furnishes to them an opportunity to raise all pertinent and available questions and dispute their liability, or its amount and extent.*"

Here is a tribunal before which the property owner is notified to appear, and before which under that statute, as construed by the Supreme Court of New York, he may appear and dispute his liability and its extent and raise all pertinent and available questions. By his failure to appear before this tribunal, after notice and opportunity to be heard, there is a judgment, or its equivalent, that his property is benefited to the extent or in the sum apportioned by this board of supervisors. He is bound by that judgment (obtained on notice and opportunity to be heard) to the same extent as he is bound by any other judgment of any other judicial tribunal having jurisdiction of the person and subject matter.

Says the court, page 354:

"The precise wrong of which complaint is made appears to be that the land owners now assessed never had opportunity to be heard as to the original apportionment, and find themselves now practically bound by it as between their lots and those of the owners who paid."

"But this is a mere criticism of the Act of the l
lature."

"The land owners are given a hearing, and so t
was no constitutional objection in that respect. *N*
that hearing illusary. It opened to the land owner an op
tunity to assail the constitutional validity of the act u
which alone an apportionment could be made, and that
jection failing, it opened the only other possible q
tions, of the mode and the amounts of the apportionm
itself. 100 N. Y. 587-9, quoted in Spencer vs. Merch
125 U. S. 345 at 352-3-4-5. By certiorari, the prop
holder could have taken the case to the Supreme Cour
New York, thence to New York Court of Appeals, th
to this court, as was done in New York State vs. I
erts, 171 U. S. 658. The legislature has the righ
place the whole charge on the abutting property (to
extent, and only to the extent of the benefits) even if
State receive a benefit twice as much. It may be a g
injustice to local property owners for the State at la
to receive a very large benefit and yet compel local p
erty to pay the charges, but the legislature has that
cretion.

"No hearing would open the discretion of the legi
ture, or be of any avail to review or change it." No
ference how much the general public were benefited
the other lot owners who paid, if one lot owner was
benefited he need not pay. He can "dispute" his liabil
and may be successful in such "dispute."

The board of supervisors had jurisdiction to de
mine whether this Act of 1881 was repugnant to the C
stitution of the United States. Suppose the prope
owner made that defense and was defeated, could he
tack the judgment collaterally?

These plaintiffs in error made the defense in
Jackson Circuit Court that the Kansas City charter
repugnant to the Constitution of the United Stat
We were defeated. Were we at liberty to disregard t
judgment? Were we at liberty to litigate a new, coll
erally, all the questions we might have set up, and
set up, in that case, and on which we were defeated?

Under the Act of 1881 the board of supervisors
Kings county had judicial powers.

Any land-owner (says the highest court of the state of New York, passing judgment on this New York statute) may appear and dispute his liability. And this hearing is not illusory. He may then be successful in his dispute of his liability or the amount. If one may be successful, all may be successful.

It is one thing for the legislature to prescribe it as *a general rule* that property abutting on a street opened shall be deemed benefited; it is quite a different matter for the legislature of New York to prescribe by its legislative enactment that Mr. Spencer's property (in Spencer vs. Merchant) was benefited to the amount of $1,221.73. It is one thing for the legislature of Kansas City to determine, *if it had authority*, that in general property on Forest avenue is benefited by the paving; it is quite a different thing to determine that Mrs. French's property is benefited $302.54. It is always competent for the legislature to fix the "benefit district."

In Bauman vs. Ross, 167 U. S. 548 at 564, where it appears that the contention was that the Act of Congress was void because it failed to fix the limits of the benefit district.

Bauman vs. Ross, 167 U. S. Loc. Cit. 591.

"It was argued that Section 15 was too uncertain to be put into execution, because it failed to define the district or territory within which the benefits might be assessed, and did not even specify whether the assessment should or should not be confined to lands within the particular sub-division in which a new highway was established. But in either alternative the assessment could not include lands outside of the District of Columbia; and the section would be equally constitutional whether the district of assessment was the particular sub-division, or the whole district of Columbia."

Bauman vs. Ross, 167 U. S. 590.

"If the legislature, in taxing lands benefited by a highway, or other public improvement, makes provision for notice by publication or otherwise, to each owner of land, and for hearing him, at some stage of the proceedings, upon the question what proportion of the tax shall be assessed upon his land, his property is not taken without due process of law. Davidson vs. New Orleans; Spencer vs. Merchant; Walston vs. Nevin; Lent vs. Tillson; Paulsen vs. Portland; Fallbrook Irrig. Dist. vs. Bradley, above cited.',

The New York Statute gave that hearing.

Parsons vs. District of Columbia, 170 U. S. 45, is cited as being in opposition to Norwood vs. Baker. That was a general tax. This appears from the statutes referred to, or it may be called a special tax.

But there is a difference between a special tax and a local tax or assessment. This is shown in Farrar vs. St. Louis, 80 Mo. 379 at 386-7-8-9 and 390-1.

The Kansas City charter confers on the mayor and common council a bare authority. The power to determine whether there are benefits, and how much, is not given, and is therefore withheld. The authority was to pave Forest avenue and charge the entire cost on the abutting property, knowing it was no benefit.

This must have been the case in Zoeller vs. Kellogg, 4 Mo. Appeals 163, for there the land, with all additions by way of improvement or enhancement of value, was worth $1,025, and tax-bills were $1,645. Precisely the same thing may happen under the Kansas City charter. Taxation must exist by statute. The general common law cannot help it out. The assessment or tax-bill sued on is void because it is founded on a rule which excludes any consideration of benefits. To the extent of the excess of the cost of the work over and above any special peculiar exceptive benefits, it is taking private property for public use without just compensation. The legislative enactment that accomplishes this result may be, and doubtless is, the process of the mob, but it is not "Due Process of Law."

The legislative power cannot fix or determine the "just compensation" to which the owner of property taken for public use is entitled.

Monongehala Navigation Company vs. United States, 148 U. S. 312.

County Court of St. Louis County vs. Griswold, 58 Mo. 175 at 199—top.

If "these exceptive benefits" constitute part or all of the "just compensation" required by the constitution; how can the legislature of Missouri, or the common council of Kansas City (even if duly authorized, which we do not admit) determine the one any more than the other?

I have received valuable assistance in making this brief from Mr. John C. Gage, Judge F. M. Black and Judge Richard H. Field and from other lawyers.

I respectfully ask a reversal of the judgment; and that this court enter judgment for plaintiffs in error, or remand the cause to the Supreme Court of Missouri with directions to reverse the judgment of the Jackson Circuit Court and remand the case to that court with directions to enter judgment for plaintiffs in error.

All of which is most respectfully submitted.

HENRY N. ESS.

Counsel for Plaintiffs in Error.

INDEX.

INDEX TO STATEMENT OF THE CASE. PAGE.

Statement of the case and local statutes 1 to 27
Brief 27 to 33
Brief in reply 33 to end

STATEMENT OF CASE. 1 to 7

Petition, answer and objections under fourteenth amendment 1 to 3
Restrictions in ordinance and contract for doing the work 4
Instructions asked and refused 5
Motion for new trial and arrest 6
Errors in circuit court and in supreme court 7
City charter and constitutional provisions 8 to 22
Front foot rule, city charter, sec. 5 11 to 12
State constitutional provisions 22 to 27
Private property for public use 22 to 23
Depriving of life, liberty or property 23 to 24
Taxation—Constitutional provisions 1820 to 1875 24
Constitution of 1875—Taxation 24 to 27
Frontage statute 11 to 12
Construction of this statute by supreme court of Missouri 28 to 31
City council not authorized to fix amount of benefits to each property owner 31 to 32
Local tax levied without reference to benefits and void under 14th amendment—Cases cited 32-3

BRIEF IN REPLY.

Benefit alone the foundation of this tax 33 to 41
Local tax; without special exceptive benefit, "takes private property for public use without just compensation"—Cases cited 41-2
Statutes authorizing personal judgment for local taxes are unconstitutional, as taking private property for public use without just compensation 41 to 50

All (or nearly all) local tax laws in Mo. invalidated by the decision of the Mo. Supreme Court in city of St. Louis to use Seibert vs. Allen 50–1
The test of constitutionality is what may be done under a law, not what has occurred—Cases cited 52–3
What is due process of law?—Cases in this court reviewed with reference to the case at bar .. 53 to end

N° 498.

DEC 21 1900
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 498.

MARGARET FRENCH ET AL., PLAINTIFFS IN ERROR,

vs.

BARBER ASPHALT PAVING CO., DEFENDANT IN ERROR.

RESOLUTION OF CITY COUNCIL OF ST. LOUIS, FILED IN SUPPORT OF MOTION TO ADVANCE.

WILLIAM C. SCARRITT,
Counsel for Defendant in Error.

EDWARD L. SCARRITT,
Of Counsel.

(17,983.)

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 12-20-1900

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 498.

MARGARET FRENCH ET AL., PLAINTIFFS IN ERROR,

vs.

BARBER ASPHALT PAVING CO., DEFENDANT IN ERROR.

Resolution of City Council of St. Louis Filed in Support of Motion to Advance.

Whereas a large amount of public improvements in the nature of street improvements and sewers must be executed by the city of St. Louis preparatory to welcoming the visitors to the World's fair to be held here; and

Whereas grave doubts have arisen as to the validity of certain of the charter provisions and ordinances of this city under which for many years the city has been accustomed to contract and pay for such works by assessments levied in the manner commonly known as that according to the front-foot or area rule; and

Whereas the welfare and progress of this city and the exigencies of the time demand that the question of the validity of these laws be settled as speedily as possible; and

Whereas there is now pending before the Supreme Court of the United States the case of French *et al. vs.* Paving Company, on writ of error to the supreme court of Missouri, involving the validity of a similar law:

Be it resolved by the council of St. Louis, That the Honorable the Chief Justice and the Justices of the Supreme Court of the United States be, and they are hereby, respectfully, but earnestly, petitioned to advance the said case of French *et al. vs.* Paving Company and hear the same at a date as early as the convenience of the court will permit, to the end that the people and controlling authorities of this city may have the guidance of that honorable court in the framing and in the execution of the laws in respect to the matters hereinbefore recited.

STATE OF MISSOURI, } *ss:*
City of St. Louis, }

I, Charles R. Graves, secretary of the city council of St. Louis, do certify that the foregoing is a true copy of the original resolution adopted and passed by the said city council of St. Louis on December 18, 1900.

In witness whereof I have hereunto set my hand this 18th day of December, 1900.

Chas. R. Graves,
Secretary City Council.

[Endorsed :] File No., 17,983. Supreme Court U. S., October term, 1900. Term No., 498. Margaret French *et al.*, P. E., *vs.* The Barber Asphalt Paving Co. Resolution of city council of St. Louis. Filed Dec. 21, 1900.

No. 498. IN THE 33972

Supreme Court of the United States.

Brf. of Scarritt for D. E.

OCTOBER TERM, 1900.

Filed Feb. 25, 1901.

MARGARET FRENCH et al.,
Plaintiffs in Error,

vs.

No. 498.

THE BARBER ASPHALT PAVING COMPANY,
Defendant in Error.

Office Supreme Court U.S.
FILED
FEB 25 1901
JAMES H. McKENNEY,
Clerk.

In Error to the Supreme Court of the State of Missouri.

Statement and Brief on Behalf of Defendant in Erro

WILLIAM C. SCARRITT,
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ELLIOTT HAMILTON JONES,
Of Counsel.

(No. 17,983.)

HORN PRINTING COMPANY,
14th St. and Baltimore Ave.
Kansas City, Mo.

THE METHOD OF LEVYING AND COLLECTING SPECIAL ASSESSMENTS TO PAY FOR STREET PAVEMENTS, PRESCRIBED BY THE TERMS OF THE CHARTER OF KANSAS CITY, DOES NOT VIOLATE THE CONSTITUTIONAL GUARANTY THAT NO PERSON SHALL BE DEPRIVED OF HIS PROPERTY WITHOUT DUE PROCESS OF LAW.

INDEX.

Pa
Statement
Kansas City Charter a general law
Presumption of validity
Law of the land
Fourteenth Amendment created no new rights
Missouri Statutes recognizing front foot rule
Missouri decisions sustaining the rule
State and National laws recognizing the rule
State decisions sustaining the rule
U. S. decisions refuting objections to the rule
    Legislative power to fix benefit district
    Legislative power to fix basis of assessment
    Notice to property owners 8
Text-writers' views 8
Taxation and due process of law 8
Village of Norwood vs. Baker 10
Practical questions involved 11
Vested rights 12
Conclusion 12

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1900.

MARGARET FRENCH et al., *Plaintiffs in Error,* *vs.* THE BARBER ASPHALT PAVING COMPANY, *Defendant in Error.*	No. 498.

STATEMENT.

This suit was instituted as a law action in the circuit court of Jackson county, Missouri, a court of general original jurisdiction, returnable to the October term, 1899, thereof, for the purpose of enforcing against a certain lot of defendants, now plaintiffs in error, the lien of a tax bill issued by Kansas City in part payment of the cost of paving Forest avenue from Independence avenue to Twelfth street with an asphalt pavement. Defendants were notified of the action by summons served upon them personally as required by law.

The petition[1] is in the usual form for such actions in that jurisdiction and states, in addition to formal allegations, that Kansas City, by its certain ordinance, provided for the paving of Forest avenue from Independence avenue to Twelfth street in that city; that the contract for the work had been duly awarded to the defendant in error and duly confirmed by the mayor and common council of said city; that the work had been executed and completed according to the terms of the contract by the defendant in error and had been accepted by the city; that the cost of said work had been duly assessed and apportioned against the lots and lands chargeable therewith as provided by the charter and ordinances of said city, and that thereafter, on the 15th day of October, 1894, the city, acting by and through its Board of Public Works, made out and issued to the plaintiff a certain special tax bill, payable in four equal installments against the certain lot owned by defendants and fronting on the improvement in part payment of the cost of said work; which said special tax bill and the four installments thereof were set forth in full[2] in the petition. The tax bill recited a description of the lot owned by plaintiffs in error, the amount charged against it, and how, when and where and with what interest the same was payable. The relief prayed for was special judgment for the amount due on the tax bill and the enforcement of the lien thereof against the land described in the tax bill. No personal judgment was sought or obtained against defendants.

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[1] —p. 2. *These numbers refer to the page of the printed Transcript of Record.

The answer of Oliver H. Dean, trustee for William D. McLeod, and William D. McLeod[3] is a general denial.

The answer of Margaret French and Henry French[4] contains five counts in which it is alleged in several different forms that the provisions of the charter of Kansas City under and by virtue of which the special assessment in question was apportioned and charged are unconstitutional and void, and that Kansas City had no authority, other than said charter provisions alleged to be void, to execute the contract for the work or to execute and issue the tax bill on which the suit is founded, and that the tax bill sued on is therefore void. The allegations of the answer may be resolved into the contention that the method of apportioning and charging the cost of the pavement provided by the charter of Kansas City, Missouri, violates the limitation of the Federal Constitution that no state shall deprive any person of his property without due process of law. No other error than the denial of this proposition is assigned by the plaintiff in error in their assignment of errors[5] for the consideration of the court.

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[2] —p. 3. [3] —p. 16. [4] —p. 9.

The reply of the Paving Company[6] denies the new matter in each count of the answer of French contained and alleges that the work of paving the said Forest avenue greatly enhanced the value of the real estate against which the assessment was made, and that the real estate was specially benefited to an amount equal to and largely in excess of the cost of the improvement so assessed against the land, and that the cost and expense of paving Forest avenue had been properly assessed and apportioned against the lots and lands benefited thereby.

The work done consisted of paving with asphaltum the roadway of Forest avenue in the said city, thirty-six feet[7] in width, from Independence avenue to Twelfth street, a distance of one-half of a mile. Forest avenue is one of the oldest and best improved residence streets in Kansas City, and all of the lots abutting thereon front the street and extend back therefrom an equal depth[8] to an alley. The lands, including the lot in question, are improved and used for residence purposes, and all of the lots are substantially on the grade of the street as improved, and are similarly situated[8] with respect to the asphalt pavement.

The structure of the pavement along its entire extent is uniform in character and quality.[7] There is no showing that there is any difference in the value of any of the lots abutting upon the improvement. The evidence of four witnesses was taken, each of whom testified that each and every lot fronting on that part of the street improved was specially benefited by the improvement to an amount exceeding the part of the cost of the pavement assessed against it, and that each of the several lots abutting upon the improvement shared the total benefit sustained by all such lots in the proportion of the frontage of each lot thereon to the total frontage on the improvement of all such lots.[9] There was not a scintilla of evidence offered to the contrary.

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[5] —p. 50. [6] —p. 17. [7] —p. 33. [8] —p. 19.

This paving procedure was inaugurated conformably to the requirements of the Kansas City charter by the adoption of a resolution[10] by the common council of the city declaring the work of paving the street to a stated extent and with a pavement of a defined character to be necessary, which resolution was first recommended by the Board of Public Works of the city.[11] This resolution was thereupon published for ten days in the newspaper doing the city printing.[6] Thereafter the resident owners of the city, owning a majority of front feet of lands belonging to such residents and fronting on that part of the street to be improved, had the right within thirty days after the first day of the publication of the resolution to file a remonstrance with the city clerk against the proposed improvement and thereby to divest the common council of the power to make the improvement; and such property owners had the right, by filing within the same period a petition so to do, to have such street improved with a different kind of material or in a different manner from that specified in such resolution.[12] In this proceeding neither such a remonstrance nor petition was filed,[13] and the common council, upon the recommendation of the Board of Public Works, enacted an ordinance[14] numbered 5891, requiring the construction of the pavement. The charter requires that a contract for such work shall be let to the lowest and best bidder.[15] Thereupon bids for the work were duly advertised for and the plaintiff, being the lowest and best bidder therefor, on the 31st day of July, 1894, entered into a contract with Kansas City for the construction of said pavement.

9—pp. 20 to 25. 10—p. 26 Sec. 3; K. C. Charter, Art. 9, Sec 2.

11—K. C. Charter, Art. 9, Sec. 2.

12—K. C. Charter, Art. 9, Sec. 2.

13—p. 26. 14—p. 25.

15—K. C Charter, Art. 17, Sec. 12.

Both the ordinance and contract expressly provide that the work shall be paid for by the issuance of special tax-bills[16] according to the provisions of the Kansas City charter, and that the city shall not in any event be liable for or on account of the work.[16] The cost of the pavement was apportioned and charged against the lots fronting thereon, according to the method prescribed by the charter, which is, that the total cost of the work shall be apportioned and charged against the lands abutting thereon according to the frontage of the several lots or tracts of lands upon the improvement.[17] The charge against each tract of land is evidenced by a tax-bill. The tax-bill representing the assessment against each lot is, by the charter, made a lien upon the tract of land against which it is issued, and is *prima facie* evidence of the validity of the charge represented by it. Such lien can be enforced only by suit in a court of competent jurisdiction against the owners of the land charged. No personal judgment is authorized to be rendered against the owner of the land. The right is expressly conferred on the owner of reducing the amount of the recovery by pleading and proving any mistake or error in the amount of the bill, or that the work was not done in a good and workmanlike manner.[18]

The judgment of the trial court was for the plaintiff[19] for the amount due on the tax bill and for the enforcement of its lien, from which the defendants, having unsuccessfully moved for a new trial and in arrest of judgment, in both of which motions their contentions upon the federal question raised by their answer were renewed, appealed to the Supreme Court of Missouri. In that court the plaintiffs in error renewed their contentions as to the unconstitutionality of the provisions of the parts of the charter of Kansas City involved in this assessment, and that court, sitting in banc at the October Term, 1900, in an opinion[20] by Chief Justice GANTT, denied the contentions of the plaintiffs in error and affirmed the judgment of the trial court; and this cause is now in this court on writ of error to the Supreme Court of the State of Missouri.

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[16] 16—pp. 26, 31.

[17] 17—K. C. Charter, Art. 9, Sec. 5.

[18] 18—K. C. Charter, Art. 9, Sec. 18.

[19] 19—p. 17.

The provisions of the Kansas City charter declaring the power and establishing the method of procuring and paying for street pavements are copied as an appendix to this brief under the caption, Kansas City Charter Provisions.

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[20] 20—p. 36.

BRIEF AND ARGUMENT.

I.

The charter of Kansas City as to all matters of local concern has the same authority, dignity and effect as a general act of the legislature of the state.

This charter was framed and adopted conformable to Sections 16 and 17, Article IX of the Constitution of Missouri, and went into effect May 9th, 1889. Those sections are as follows:

Sec. 16. *Large cities may frame their own charters, how.*—Any city having a population of more than one hundred thousand inhabitants may frame a charter for its own government, consistent with and subject to the constitution and laws of this state, by causing a board of thirteen freeholders, who shall have been for at least five years qualified voters thereof, to be elected by the qualified voters of such city at any general or special election; which board shall, within ninety days after such election, return to the chief magistrate of such city a draft of such charter, signed by the members of such board or a majority of them. Within thirty days thereafter, such proposed charter shall be submitted to the qualified voters of such city, at a general or special election, and if four-sevenths of such qualified voters voting thereat shall ratify the same, it shall, at the end of thirty days thereafter, become the charter of such city, and supersede any existing charter and amendments thereof. A duplicate certificate shall be made setting forth the charter proposed and its ratification, which shall be signed by the chief magistrate of such city and authenticated by its corporate seal. One of such certificates shall be deposited in the office of the secretary of state, and the other, after being recorded in the office of the recorder of deeds for the county in which such city lies, shall be deposited among the archives of such city, and all courts shall take judicial notice thereof. Such charter, so adopted, may be amended by a proposal therefor, made by the law-making authorities of such city, published for at least thirty days in three newspapers of largest circulation in the city, one of which shall be a newspaper printed in the german language, and accepted by three-fifths of the qualified voters of such city, voting at a general or special election, and not otherwise; but such charter shall always be in harmony with and subject to the constitution and laws of the state.

Sec. 17. *Provisions of such charters.*—It shall be a feature of all such charters that they shall provide, among other things, for a mayor or chief magistrate, and two houses of legislation, one of which at least shall be elected by general ticket; and in submitting any such charter or amendment thereto to the qualified voters of such city, any alternative section or article may be presented for the choice of the voters, and may be voted on separately, and accepted or rejected separately, without prejudice to other articles or sections of the charter or any amendment thereto.

In the case of *Kansas City vs. Scarritt* (1895), 127 Mo., 642, was involved the validity of an act of the legislature of the state providing a method by which that city might acquire lands for park and boulevard purposes. That statute was declared void.

In the opinion of the court, by BARCLAY, J., it is said:

"The act under review relates solely to matters of internal municipal government. It seeks to amend the existing charter of Kansas City in a number of ways; and its last passages indicate plainly that such is its main design. It cannot be supported without nullifying the guaranty which the fundamental law gives, in section 16, above quoted, against invasion of the right of local self-government in the internal affairs of such cities. * * * *

"We think the command in the organic law to the effect that the charter of Kansas City shall be amended by the acts of her own people, 'and not otherwise,' was written to be obeyed; and that it forbids the regulation and direction of purely municipal affairs in that city by act of the legislature. We believe that in authorizing Kansas City to frame a charter for its own government, the people of the state meant exactly what the constitution says, and nothing less."

Kansas City vs. Ward, 134 (1896), Mo., 172 upholds the validity of an amendment to the Kansas City charter providing a method of establishing and acquiring a system of parks and boulevards.

The intrepretation of the same provisions of the constitution was again before the Supreme Court of Missouri in the case of *Kansas City vs. Oil Co.* (1897), 140 Mo., 458, and in the opinion of the court, rendered by GANTT, J., this language is used:

"That the people of Missouri, in their soverign capacity and by their organic law, could delegate to the people of a municipality this power to frame a charter for its own local government as to matters falling properly within municipal regulation, we have no doubt whatever. Such a right is entirely in accord with the genius of our institutions, bringing the regulation and government of local affairs within the observation of those who are to be affected thereby, and at the same time preventing the officious and selfish intermeddling with the charters of our cities without the knowledge of those whose rights are affected."

II.

While the jurisdiction of this court to declare the impugned portion of the Kansas City charter void, may not be questioned, the presumption of validity is to be indulged, and an impelling motive stronger than a favorite interpretation of language will be exercised before the court will pronounce the charter unconstitutional, because:

It is a general law;

The principle involved, the feature criticised, is incorporated in and forms a part of the fundamental law of every city in Missouri organized under its general laws, including the cities of St. Louis and Kansas City;

The right of the legislative department of the government to fix the rule or basis on which special benefits accruing from a local improvement are sustained by adjacent lands has been the recognized policy of the state since the day the first municipal corporation was organized;

It has been discussed, considered and approved, over every objection now urged, in many sessions of the legislature, covering a period of eighty years;

It has the repeated and unanimous approval of the state judiciary. It purports on its face to be the exercise by the sovereign people through legislative instrumentality of the sovereign power of taxation.

Shaw, C. J., in *Wellington vs. Petitioner*, 16 Pick., 87, for the court says:

"When courts are called upon to pronounce the invalidity of an act of legislation, passed with all the forms and ceremonies requisite to give it the force of law, they will approach the question with great caution, examine it in every possible aspect, and ponder upon it as long as deliberation and patient attention can throw any new light upon the subject and never declare a statute void unless the nullity and invalidity of the act are placed, in their judgment, beyond reasonable doubt."

Mr. JUSTICE WASHINGTON, in *Ogden vs. Saunders*, 12 Wheat., 270, for the court says:

> "It is but a decent respect due to the wisdom, the integrity and the patriotism of the legislative body by which any law is passed, to presume in favor of its validity until its violation of the Constitution is proved beyond all reasonable doubt."

JUDGE WAGNER, in *State ex rel. vs. Railroad*, 48 Mo., 471, speaking for the court, uses this language:

> "No rule of construction is better established, both upon principal and authority, than, that acts of the legislature are to be presumed constitutional until the contrary is clearly shown; and it is only when they manifestly infringe on some provision of the constitution that they can be declared void for that reason."

The method of apportioning and collecting the cost of a street pavement under the Kansas City charter is said to violate the declared rule that no state shall deprive any person of his property without due process of law. Avoiding the unaccomplished task of defining that phrase of simple words, we assert:

III.

The law of the land or due process of law, as this expression is used in the Fourteenth Amendment, means the common law and the statute law existing in the state at the time of the adoption of this amendment, or as subsequently and constitutionally modified by the state.

State vs. Simons, 2 Spears (S. Car.), 761.

In *Louisville vs. Cochran*, 82 Ky., 15, HARGIS, C. J., speaking for the court, says:

> "It is well and clearly settled that 'the law of the land,' in constitutional meaning refers to the common and statute law in force when the constitution was adopted. * * * In *Walker vs. Sauvinet*, 92 U. S., 90, it is said in an opinion by WAITE, C. J.: 'Due process of law is process due according to the law of

the land.' This process in the states is regulated by the law of the states."

Mr. Justice MATTHEWS, in *Hurtato vs. California*, 110 U. S., 519, says:

"In the Fourteenth Amendment, by parity of reason, it (due process of law) refers to that law of the land in each state which derives its authority from the inherent and reserved powers of the state, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and the greatest security for which resides in the right of the people to make their own laws and alter them at their pleasure."

No new rights were created or conferred by the declaration of the Fourteenth Amendment here relied on. Its purpose was to guarantee those already in existence. It is a conservatory rather than a reformatory force. The writing of these words as positive law limiting the power of states did not enlarge the meaning of the words: They were in the Constitution before.

Eames vs Savage, 77 Me., 212; *Minor vs. Happersett*, 21 Wall., 162; *In re Lockwood*, 164 U. S., 116; *U. S. vs. Wang Kim Ark*, 169 U. S., 649; *Alfalfa Irrigation District vs. Collins*, 46 Neb., 411; *Wolzen vs. San Francisco*, 101 Cal., 15; *Mayo vs. Wilson*, 1 N. H., 53; *Weimer vs. Bunbury*, 30 Mich., 201.

COOLEY, J., speaking for the court in the last case cited, says:

"There is nothing technical or, we think, obscure in the requirement that process which divests property shall be due process of law. The constitution makes no attempt to define such process but assumes that custom and law have already settled what it is. Even in judicial proceedings we do not ascertain from the Constitution what is lawful process, but we test their action by principles which were before the Constitution, and the benefit of which, we assume, that the Constitution was intended to perpetuate. If there existed, before that instrument was adopted, well known administrative proceedings which, having their origin in a legislative conviction of their necessity, had been sanctioned by long and general acceptance, we are no more at liberty to infer an intent in the people to prohibit them by implication from any general language than we should be to infer an intent to abridge the judicial authority by the use of similar words. The truth is, the bills of rights in the American Constitutions have not been drafted for the introduction of new law, but to secure old principles against abrogation or violation. They are conservatory instruments rather than reformatory; and they assume that the existing principles of the common law are ample for the protection of individual rights when once incorporated in the fundamental law, and thus secured against violation.

We are, therefore, of necessity, driven to an examination of the previous conditions of things if we would understand the meaning of due process of law as the Constitution employs the term. Nothing previously in use, regarded as necessary in government and sanctioned by usage, can be looked upon as condemned by it. Administrative process of the customary sort is as much due process of law as judicial process. We should meet a great many unexpected and very serious embarrassments in government if this were otherwise. The words, it has very justly been said, 'were intended to secure the individual from the arbitary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.'—per Johnson, J., in *Bank of Columbia vs. Okely*, 4 Wheat., 235. It has been said, with special reference to process for the collection of taxes, 'that any legal process which was originally founded in necessity, has been consecrated by time, and approved and acquiesced in by universal consent, must be considered an exception to the right of trial by jury, and is embraced in the alternative law of the land.' *State vs. Allen*, 2 McCord, 56. In *High vs. Shoemaker*, 22 Cal., 363, the same doctrine was held in a revenue case. In *Rockwell vs. Nearing*, 35 N. Y., 308, which is quoted for defendant in error as sustaining his position, the opposite view is very distinctly taken. 'There are,' says Porter, J., 'many examples of summary proceedings which were recognized as due process of law at the date of the constitution, and to these the prohibition has no application.' "

In *Alfalfa District vs. Collins* (1895), 46 Neb., 421, Post, J., says:

"The prohibition against the taking of private property without due process of law is not peculiar to the national Constition, but is a part of the fundamental law of a majority, if not all, of the states. It is worthy of note, too, in this connection, that the foregoing rule was firmly established long prior to the adoption of the Fourteenth Amendment. 2 Kent's Commentaries, 340; *Beekman vs. Saratoga & S. R. Co.*, 3 Paige Ch., (N. Y.), 73;

Coster vs. Tide Water Co., 18 N. J. Eq., 54, 518, and cases cited. The reasonable inference is that the restriction therein upon the powers of the states relating to private property was intended to harmonize the national bill of rights with the provisions of the several State Constitutions, rather than to introduce a new and distinct principle or rule of construction. It is doubtful, indeed, if that enactment had the effect to enlarge the rights of property secured by the common law, since, as shown in *Davidson vs. New Orleans*, 96 U. S., 97, the term 'due process of law' means no more than the 'law of the land' as employed in Magna Charta."

In *Eames vs. Savage*, 77 Me., 212, EMERY, J., for the court, says:

"That the statute or rule of law, or custom, has so long existed unquestioned, and has been so often invoked and universally approved, and has become ingrained like this in the jurisprudence of a state, is a strong, if not conclusive reason, for pronouncing it constitutional, and a part of the 'law of the land.' *State vs. Allen*, 2 McCord, 56; *Sears vs. Cottrell*, 5 Mich., 251. * * *

But it has been expressly decided that due process of law does not always mean judicial process. The individual's property is often taken for taxes without his being first warned and heard, and it is nowhere contended now that such summary process is not due process of law. It is the fixed certain process applicable to all, and not partial nor unequal. *McMillen vs. Anderson*, 95 U. S., 37. Mr. Justice MILLER, in the opinion, said: 'By summary is not meant arbitrary, nor unequal or illegal.' It (the collection of the tax) must, under our Constitution, be lawfully done. But that does not mean, nor does the phrase 'due process of law' mean, by a judicial proceeding. In *Murray vs. Hoboken Land Company*, 18 How., 272, a warrant of distress was issued by the solicitor of the treasury against the collector of New York, upon a certificate of the first controller, that the collector was indebted to the treasury. The collector had not been notified nor heard, so far as appears. The statute authorizing such a process was held constitutional. Judge CURTIS, on page 276, said: 'The Constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process.' * * *

The words 'due process of law' in the Fourteenth Amendment do not have any enlarged or different meaning from that heretofore ascribed to them. The amendment does not make Federal law and Federal process of law the 'law of the land' and 'due process of law in each' in each state. Whatever was due process of law in any state before the amendment is due process of law in that state since the amendment. Before the amendment the final determination of the question whether a state statute was according to the law of the land, rested with the courts of the state. Since the amendment it rests with the Supreme Court of the United States. It is through this operation of the amendment that the citizen received additional protection against unequal and partial laws.

The United States Supreme Court, in considering and determining such a question, will look mainly at the fundamental law and general jurisprudence of the state. If the statute or process is found to be of ancient origin, to have been fully acquiesced in, to be general in its character and impartial in its application, and interwoven with the business of the people, that court will not pronounce against it because it is anomalous or has not been adopted elsewhere."

In *Wulzen vs. Board of Supervisors*, 101 Cal., 15, the court say:

"The terms 'due process of law' or 'due course of law' or 'law of the land,' all of which signify the same thing, are sometimes defined as 'law in its course of administration through courts of justice.' As applied to judicial proceedings, this definition is concise and precise, but in a broader sense the term signifies such an exercise of the powers of the government as the settled maxims of law permit and sanction, and under such safe-guards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs.

Administrative process, it has been said, of the customary sort, is as much due process of law as judicial process. To settle the question, as applied to a given state of facts, we have but to examine the previous condition of things in use, and regarded as essential to the protection of the rights of the individual under such circumstances, and if in substantial compliance with such essentials, the course prescribed may be said to be in consonance with the law of the land, and to constitute due process of law."

In *Minor vs. Happersett*, 21 Wall., 162, Chief Justice WAITE, for the court, says:

"The Fourteenth Amendment did not affect the citizenship of women any more than it did of men. In this particular, therefore, the rights of Mrs. Minor do not depend upon the amendment. She has always been a citizen from her birth, and entitled to all the privileges and immunities of citizenship. The amendment prohibited the state, of which she is a citizen, from abridging any of her privileges and immunities as a citizen of the United States; but it did not confer citizenship on her. That she had before its adoption. * * *

The amendment did not add to the privileges and immunities of a citizen. It simply furnished an additional guaranty for the protection of such as he already had."

In re Belva A. Lockwood, 154 U. S., 116, Chief Justice FULLER, for the court, says:

"In *Minor vs. Happersett,* 21 Wall., 162, this court held that the word 'citizen' is often used to convey the idea of membership in a nation, and in that sense women, if born of citizen parents within the jurisdiction of the United States, have always been considered citizens of the United States as much so before the adoption of the Fourteenth Amendment of the Constitution as since; but that the right of suffrage was not necessarily one of the privileges or immunities of citizenship before the adoption of the Fourteenth Amendment, and that amendment did not add to these privileges and immunities."

In *United States vs. Wang Kim Ark.*, 169 U. S., 649, it was held that:

"The opening sentence of the Fourteenth Amendment is affirmative of existing law, and declaratory of existing rights, and was intended to allay doubts and settle controversies which had arisen, and not to impose any new restrictions upon citizenship."

In *Walker vs. Sauvinet*, 92 U. S., 90, Chief Justice WAITE, for the court, says:

"The states, so far as this amendment is concerned, are left to regulate trials in their own courts in their own way. A trial by jury in suits at common law pending in the state courts is not, therefore, a privilege or immunity of national citizenship, which the states are forbidden by the Fourteenth Amendment to abridge. A state cannot deprive a person of his property without due process of law; but this does not necessarily imply that all trials in the state courts affecting the property of persons must be by jury. This requirement of the Constitution is met if the trial is had according to the settled course of judicial proceedings. *Murry vs. Hoboken L. & I. Co.*, 18 How., 280. Due process of law is process due according to the law of the land. This process in the states is regulated by the law of the state. Our power over that law is only to determine whether it is in conflict with the supreme law of the land; that is to say, with the Constitution and the laws of the United States made in pursuance thereof; or with any treaty made under the authority of the United States. Here the state court has decided that the proceeding below was in accordance with the laws of the state; and we do not find that to be contrary to the Constitution or any law or treaty of the United States."

IV.

The methods of special taxation now criticised were developed and established in Missouri statutes and decisions before the Fourteenth Amendment.

We will review the statutory laws and court decisions of Missouri prior to the adoption of the Amendment in respect to what property was deemed to be benefited by paving a street, and the basis on which that benefit was apportioned, and who determined both.

STATUTORY LAWS OF MISSOURI:

1822: St. Louis—An act to incorporate the inhabitants of St. Louis, December 9, 1822.

Sec. 13. Be it further enacted, that upon the application of the holders of two-thirds of the front of lots on any street, or part of a street, it shall be lawful for the mayor and aldermen to levy and collect a special tax on the holders of the lots on said street, or part of a street, according to their respective fronts, for the purpose of paving such street or part of a street. (Laws of Mo., 1825, p. 202, Sec. 13).

1839.—Power was granted to levy a special tax on the holders of lots on any street or alley according to the respective fronts owned by them, for the purpose of paving or grading such street or alley (Laws of Mo., 1838-39, p. 164, Sec. 7).

1841-1843.—Same laws re-enacted. (Laws of Mo., 1840-1, p. 137, Sec. 7. Laws of Mo., 1842-3, p. 123, Sec. 8).

1851.—Power was granted to levy a special tax on owners or occupiers of lots on any street according to the respective fronts owned or occupied by them to pave or grade the sidewalk on such street; provided, the special tax shall not exceed the cost of such grading or paving according to the respective fronts as aforesaid. (Laws of Mo., 1850-1, p. 166, Sec. 5).

1855.—The cost of all grading and paving done on any street or alley, and which is to be borne by the owners of the property, shall be apportioned and charged on the adjoining lots, in proportion of their front in the manner to be prescribed by ordinance, and the lots charged shall be held by a lien for the respective apportioned share of such cost until the same and the costs attending the collection be fully paid.

Such lien may be enforced by special tax, levy and sale. (Laws of Mo., 1854-5, p. 351, Sec. 5).

1860.—The cost of paving or otherwise improving a street shall be computed and assessed by the city engineer as a special tax against the adjoining property fronting on the work done, and each lot of ground shall also be charged, in proportion to the frontage thereof, with the cost of constructing the intersections of the next adjoining streets or public highways in such manner as such officer shall deem just and equitable. The officer shall then make out a certified bill of assessment against such lot of ground and deliver the bill to the contractor, who may collect the same by ordinary process of law in the name of the City of St. Louis to his own use. (Laws of Mo., 1859-60, p. 383, Sec. 2).

The provision of the Kansas City Charter granting the power and providing the method of levying and collecting special tax for street improvements is taken from the St. Louis Charter, as enacted in Laws of Mo., 1865-66, pp. 295-96, Secs. 9-10-11. (See Laws of Mo., 1875, pp. 250-1, Secs. 1-2).

To the same effect, Laws of Mo., 1867, pp. 73-74, Secs. 9-10-11. (Laws of Mo., 1875, p. 329, Sec. 23).

1839: Jefferson City.—Power was granted to levy a special tax on holders of lots on any street according to their respective fronts owned by them for paving or grading such street. (Laws of Mo., 1839, p. 308, Sec. 13).

1847.—Laws of Mo., 1846-47, p. 149, Sec. 2, as to sidewalks; Sec. 3 as to paving and macadamizing.

1849: Louisiana.—Power was granted to levy a special tax on holders of lots on any street according to the respective fronts owned by them for the purpose of paving or grading such street. (Laws of Mo., 1848-49, p. 358, Sec. 8).

1851: Weston.—Power was granted to levy a special tax on holders of lots on any street according to the respective fronts owned by them for the purpose of paving and grading sidewalks and for paying damages incurred by any individual in opening or widening a street. (Laws of Mo., 1851-51, p. 180, Sec. 5).

1843: Warsaw.—Power was granted to levy a special tax on holders of lots on any street according to the extent of their respective fronts for the purpose of paving or grading such street. (Laws of Mo., 1842-43, p. 178, Sec. 11).

1853: Carondelet.—Power was granted to levy special tax on owners or occupiers of lots on any street according to respective fronts owned or occupied by them for purpose of grading and paving sidewalks and setting curb-stones in such street. (Laws of Mo., 1852-53, p. 249, Sec. 8).

1855: Alexandria.—Power was granted to levy special tax on holders of lots according to respective fronts owned by them for the purpose of paving such street. (Laws of Mo., 1855, Adjourned Session, p. 249, Sec. 8).

1860.—The cost of grading and paving sidewalk, curbing and gutters alongside included, and of repairing the entire carriage-way, gutter included, also cost of grading and paving alleys, shall be borne by owners of adjoining property. (Laws of Mo., 1859-60, p. 319, Sec. 11).

1855: Springfield.—Power was granted to levy special tax on holders of lots on any street according to their respective fronts owned by them for the purpose of curbing and paving sidewalk of said street. (Laws of Mo., 1855, p. 309, Sec. 6).

1857: St. Joseph.—The cost of paving shall be charged against the adjoining lots in proportion to their fronts. A tax-bill may be issued constituting a lien and be collected by proceedings at law. (Laws of Mo., 1857, p. 249, Sec. 2).

1865.—The cost of paving, guttering and curbing of streets is required to be assessed by the city engineer, as a special tax against the property fronting on the work done in proportion to the frontage thereof. A tax-bill is made out accordingly which constitutes a lien against the land described therein. It is prima facie evidence of the validity of the charge. It may be collected only by suit in a court of competent jurisdiction. (Laws of Mo., 1864-65, p. 435, Secs. 4-5).

1859: Kansas City.—Power was granted to levy special tax on the owners of the lots on any street according to the respective fronts owned by them for the purpose of grading and paving the sidewalk and setting curb-stones in such street. The special tax shall not exceed the cost of work according to the respective fronts. The special tax shall be a lien on the property charged therewith, and the payment thereof shall be enforced as prescribed by ordinance. (Laws of Mo., 1858-59, p. 215, Sec. 8).

Cost of grading, paving and repaving all sidewalks, curbing and guttering alongside included, required to be charged against the property in proportion to the frontage thereof. (Laws of Mo., 1870, p. 437, Secs. 3-4).

1859: Missouri City.—Power was granted to levy special tax on owners or occupiers of lots on any street according to the respective fronts owned by them for the purpose of paving or grading such street. (Laws of Mo., 1858-59, p. 231, Sec. 8).

1860: Waverly.—Power was granted to levy a special tax on owners or occupiers of lots on any street according to the respective fronts owned by them, for the purpose of curbing and paving the sidewalks on such street. (Laws of Mo., 1859-60, p. 294, Sec. 7).

1860: Miami.—Power was granted to levy special tax on the owners of the lots on any street according to the respective fronts owned by them for the purpose of curbing and paving the sidewalks on such street. (Laws of Mo., 1859-60, p. 341, Sec. 6).

1860: Savannah.—Power was granted to levy special tax on the owners of the lots on any street according to the respective fronts owned by them for the purpose of curbing and paving the sidewalks on such streets. (Laws of Mo., 1859-60, p. 381, Sec. 1).

1861: Liberty.—Power was granted to levy special tax on the owners of the lots on any street according to the respective fronts owned by them for the purpose of paving or grading such street. (Laws of Mo., 1860-61, p. 220, Sec. 8).

1864: Sedalia.—Power was granted to levy special tax on the owners of the lots on any street according to the respective fronts owned by them for the purpose of paving such street. (Laws of Mo., 1863-64, p. 459, Sec. 13).

1869: Chillicothe.—Cost of sidewalks is assessed against property according to frontage. (Laws of Mo., 1869, p. 108, Sec. 7.

1869: St. Charles.—Cost of paving, guttering and curbing sidewalks, grading and paving alleys, shall be assessed as a special tax against property fronting on work done in proportion to their respective fronts. No express power to pave roadway is granted. (Laws of Mo., 1869, p. 163, Sec. 12).

1870: Brunswick.—Granted power to levy special tax on the owners of the lots on any street according to their respective fronts and value for the purpose of paving or grading the street. (Laws of Mo., 1870, p. 271, Sec. 8).

1870: **Hannibal.**—The cost of paving, grading, curbing, gutter and sidewalk, on streets, the city engineer is required to compute and assess as a special tax against the property fronting on the work done and charge each lot in proportion to the frontage thereof. A tax-bill is required to be issued which constitutes a lien, and is enforced only by judicial process. (Laws of Mo., 1870, p. 303, Sec. 9).

1870: **Macon.**—Granted power to levy special tax on the owners of the lots on any street according to their respective fronts for the purpose of paving such street. (Laws of Mo., 1870, p. 403, Sec. 5).

1870: **Lexington.**—Power was granted to construct sidewalks and levy a special tax on the property fronting thereon according to the frontage of the lots. No express power to pave conferred. (Laws of Mo., 1870, p. 379, Sec. 7).

1871: Mexico.—Power was granted to levy special tax on the owners of the lots on any street according to the respective fronts owned by them for the purpose of curbing, paving and constructing sidewalks. (Laws of Mo., 1871, p. 166, Sec. 8).

From the first act of the legislature in corporating a city in this state to the date of the adoption of the Fourteenth Amendment, the power was exercised by the legislature of determining what property was benefited by the construction of a street pavement and on what basis that benefit should be apportioned. And when the legislature enacted general laws to govern all cities, conforming to the mandate of the existing State Constitution, adopted in 1875, they exercised the same prerogative in respect to this question, and enacted that the cost of paving streets in such cities should be apportioned according to the frontage of the lands fronting on the part of the street improved and be paid accordingly.

Cities of First Class: R. S. 1879, Vol. 1, Sec. 4528, p. 898. Second Class: R. S. 1879, Vol. 1, Sec. 4783, p. 954. Fourth Class: R. S. 1879, Vol. 1, Sec. 4942, p. 983.

And the same method of assessing the cost of paving streets exists today.

Cities of First Class: R. S. 1899, Vol. 2, Sec. 5392, p. 1254. Second Class: R. S. 1899, Vol. 2, Sec. 5663,

p. 1320. Third Class: R. S. 1899, Vol. 2, Sec. 5858, p. 1366. Fourth Class: R. S. 1899, Vol. 2, Sec. 5982, p. 1402.

THE MISSOURI DECISIONS.

The received construction of a statute by a State in its own courts is a part of the statute law.

In *Palmyra vs. Morton* (1857), 25 Mo., 593, it is observed:

> "Examples of local assessments for partial improvements are familiar in the legislation of states and municipal corporations. The subject has been thoroughly discussed and every principle bearing on it severely analyzed in almost every state in the Union where the power has been exercised, and it is now as firmly established as any other doctrine of American law. * * * It is the exercise of the same power that authorizes districts, counties or towns to subscribe for public improvements."

Egyptian Levee Co. vs. Hardin (1858), 27 Mo., 495, approves an act of the legislature authorizing the cost of a levee to be assessed upon property in the benefit district at an equal amount per acre.

St. Joseph vs. Anthony (1860), 30 Mo., 537, expressly upholds the validity of the front foot rule of assessing the cost of street pavements.

In *Farrar vs. City of St. Louis* (1883), 80 Mo., 379, NORTON, J., reviews the Missouri authorities and upholds the rule established by ordinance of St. Louis, apportioning the cost of a street pavement amongst the abutting tracts of land according to the frontage of the respective tracts. In this opinion it is said:

> "It is also insisted that the requirement in the ordinance that the cost of reconstruction shall be assessed against the adjoining lots according to their frontage is invalid and operates unequally and unjustly. Having shown that the charter of the city confers upon it the power to pave and reconstruct its streets, and to assess the cost of the work on the adjoining property, without binding it to any method of apportioning the cost, but leaving the municipal authorities free to adopt any method not forbidden by the Constitution or general laws of the state, it follows that they might

adopt any method in apportioning the cost which the legislature could adopt.

"The method adopted in the ordinance of charging the cost of reconstructing Washington avenue against the adjoining lots, according to their frontage, has been repeatedly authorized by the legislature of the state by express statute, and such enactments have been upheld and received the sanction of the court in the following cases: *Palmyra vs. Morton*, 25 Mo., 594; *St. Joseph vs. Anthony*, 30 Mo., 538; *Fowler vs. St. Joseph*, 37 Mo., 228; *Powell vs. St. Joseph*, 31 Mo., 347; *City of St. Joseph vs. O'Donohue*, 31 Mo., 345; *St. Louis vs. Clemens*, 49 Mo., 554; *Neenen vs. Smith*, 50 Mo., 528; *Kiley vs. Cranor*, 51 Mo., 541; *Weber vs. Schergens*, 59 Mo., 390; *St. Louis vs. Allen*, 53 Mo., 44. The liability of lots fronting on a street, the paving of which is authorized to be charged with the cost of the work according to their frontage, having been thus so repeatedly asserted, the question is no longer an open one in this state, and we are relieved from the necessity of examining authorities cited by counsel for plaintiff condemning what is familiarly known as the 'front foot rule.' While irregularties arising in the enforcement of the rule in consequence of irregularties in the situation and depth of lots may afford a reason for an appeal to the legislative power of the state for their rectification, they would not justify the courts in invading the domain of the legislature."

The doctrine is again reviewed and affirmed in the cases of *Rutherford vs. Hamilton* (1888), 97 Mo., 543; *City of Moberly vs. Hogan* (1895), 131 Mo., 19; *Heman vs. Allen* (1900), 156 Mo., 534; *Barber Asphalt Paving Co. vs. French* (1900), 58 S. W. Rep., 924; *Hill vs. Swingley* (1900), 60 S. W. Rep., 114.

To summarize: We affirm that due process of law, as the phrase is used in the Fourteenth Amendment, or its synonym, the law of the land, means the law existing in the state at the time of the adoption of that fundamental law or as subsequently and constitutionally modified by the state; that this constitutional limitation created no new right but was intended to protect rights already in existence; that the laws of Missouri, as declared by the legislature and courts at the time of the adoption of the amendment, and for more than half a century prior thereto, recognized and enforced the authority of the legislature to apportion special taxes to pay the cost of street pavements against abutting lands according to their frontage. This was the policy, practice and adjudged law of the state under the constitutional guaranty contained in the original State Constitution, adopted July 19, 1820, to the effect that "no private property ought to be taken or applied to public use without just compensation," and that the accused cannot be deprived of life, liberty or property but by the judgment of his peers or the law of the land." (Const. of Mo., 1820, Art. XIII, Secs. 7 and 9).

It would be a strange manifestation of force if it were true that a contractor who held a tax bill issued to pay the cost of paving a street and which constituted a lien on the lands abutting on the pavement on the day prior to the adoption of the Fourteenth Amendment—a valid lien recognized by and enforcible under the laws and the judicial decisions of the state—should find himself, on the day after the adoption of this amendment, without standing in the courts—stripped of his property, because on the 28th day of July, 1868, the people of this republic, with the concurrence of the people of Missouri, had declared as a fundamental principle of their law that no person should be deprived of his property except by the law of this land.

V.

Taxing methods are the outgrowth of experience, not logic, as may be shown by legislation in general.

It has been observed by a philosophical student of human laws, that law is founded on experience, not logic. We have deemed it no light consideration in determining the inquiry before the court that the legislatures of many states and the parliament of Great Britian and of the provinces of Quebec and Ontario have declared and established in their laws that the several lands abutting on a street are benefited by the paving of that street to an amount at least which bears the same proportion to the total cost of the pavement as the frontage of such several tracts on the improvement bears to the total frontage of the lands on the improvement. And an additional number recognize the authority of the legislature to determine and fix that benefit according to a definite rule.

These enactments do not represent the exuberant or enthusiastic opinion or desire of a moment, but extending as they do over a period of nearly a century, give expression to the conscientious conviction and judgment of the civilized world, that such a method of defraying the cost of such improvement is just and equitable and the best attainable.

STATUTORY LAWS IN GENERAL:

We submit not all but such of the enactments of various legislatures as have fallen under our notice in respect to this method of assessing the cost of street pavements, and the extent of the legislature's jurisdiction to determine benefits.

ALABAMA:

"An Act to incorporate the City of Mobile," approved February 2nd, 1866, Acts. Ala., 1866, p. 202, provides that street paving,

> "* * * shall be done at the expense of the owners of the property located upon any street or part of a street so improved in such a proportion as that each piece of said property shall pay the expense of any such improvement, or fractional share thereof, equal to its front on any such street or parts of a street so improved."

ARKANSAS:

Digest of the Stats. of Ark., 1894, Sec. 5141:

> "They shall have power to lay off, open, widen, straighten and establish, to improve and keep in order and to light streets, alleys, public grounds, wharves, landing places and market places, to open and construct and keep in order and repair, sewers and drains, to enter upon and take for such of the above purposes as may be required, land or material, and to assess and collect a charge on the owner or owners of any lot or land or on lots of land, through or by which a street, alley or public highway shall pass, for the purpose of defraying the expenses of constructing, improving, repairing or lighting such street, alley or public highway, to be in

proportion to the value of such lot or land as assessed for taxation under the general law of the state."

CALIFORNIA:

Codes and Stats. of Cal., 1886, Chap. 3, Sec. 4409. A general law under which cities may be organized and governed provides:

> "Whenever the owners of a major part of the property fronting on any street or avenue desire to improve such street by paving the same or constructing sewers, or otherwise, the mayor and council may make such improvement at the expense of all the owners of property on the street, which expense must be in proportion to the number of feet owned by each."

An act to provide for work upon streets, etc., approved March 18th, 1885, provides:

> "That the expenses incurred for public work on streets shall be assessed upon the lots and lands fronting thereon" (with certain exceptions as to graduating the cost assessed against abutting and adjacent lands in certain specific instances). "Each lot or portion of a lot being separately assessed in proportion to the frontage at a rate per front foot sufficient to cover the total expenses of the work."

The acts incorporating the following named cities and towns conferred the power on the municipal authorities to pave the roadways and sidewalks of streets and charge the whole or a stated part of the cost on the lots fronting on the improvement according to the frontage of the several lots thereon.

Alameda.—Stats. of Cal., 1871-2, page 276, Sec. 6.
San Diego.—Stats. of Cal., 1871-2, p. 285, Sec. 13.
San Francisco.—Stats. of Cal. 1871-2, p. 804, Sec. 3-8.
San Jose.—Stats. of Cal., 1871-2, p. 333, Secs. 15-17.
Santa Rosa.—Stats. of Cal. 1871-2, p. 628, Sec. 36.
Stockton.—Stats. of Cal. 1871-2, p. 595, Secs. 25-28.
Vallejo.—Stats. of Cal., 1871-2, p. 566, Sec. 38.

COLORADO:

Mills Annotated Stats. of Col., 1891, Chap. 124, Sec. 4403, p. 2276, par. 10. Power is given to municipalities, "To construct and keep in repair culverts, drains, sewers and cesspools, and to regulate their use, and all cities and incorporated towns are authorized to assess either in whole or in part, except as hereinafter otherwise provided, the cost of the construction of sewers and drains upon the lot or lots, or lands adjacent to and opposite such improvement, in proportion to the frontage of such lot or lots, or land abutting upon the street or alley, provided such sewer or drain at street intersections or crossings shall be wholly paid for by such city or town; and provided further that the benefit to the public generally, if any, shall be assessed against such city or town, and the balance shall be assessed against the lot or lots of lands and the owners thereof, according to the frontage as aforesaid, said benefits to be determined as may be provided by ordinance."

FLORIDA:

Rev. Stats. of Fla., 1892, p. 292, Sec. 675.

Cities may require owners of real estate to construct uniform and substantial sidewalks around their several lots, and upon their failure to do so, the council may have the work done, the cost of which shall be a lien on said lots enforceable as provided by law.

GEORGIA:

Code of Ga., 1895, Vol. 1, Sec. 696, Chap. 1, Art. 2, provides in respect to towns and villages established after August 26th, 1892, that the council of such town or village shall have power to order the sidewalks, footways, crosswalks, drains and gutters to be curbed and paved and kept in good order, free and clear, by the owner and occupant thereof, or of the real property next adjacent thereto.

ILLINOIS:

Starr & Curtis's Ann. Stats., 1885, p. 541, Sec. 305, Laws 1875, p. 63. This act provides that the cost of construction of sidewalks "in any city or incoporated town or village" may, at the option of the city, be paid according to one of several methods provided; or,

"The whole or any part of the cost thereof may be levied upon such lot or parcels of land in proportion to their frontage upon such sidewalks . . . . . . as may be provided by the ordinance ordering the laying down of such sidewalk."

INDIANA:

Ind. Stats., 1894, Vol. 2, p. 274, Sec. 3626, provides:

"That in all contracts heretofore made or which may be hereafter made by order and under the directions of the common council of any city in this state for the grading, paving, guttering and improvement of any street or alley in such city, the cost of such improvements shall be estimated according to the whole length of the street or alley, or the part to be improved, per running foot; and the city shall be liable to the contractor for so much thereof only, as is occupied by public grounds of the city bordering thereon, and the crossings of streets and alleys; and the owners of lots bordering on such streets or alley, or the part thereof to be improved, shall be liable to the contractor for their portion of the cost in the ratio of the front lines of lots owned by them to the whole improved line."

This is a general law applicable to all cities having over 2,000 inhabitants, which elect to be organized under the general law.

Substantially the same method of apportioning the cost of grading and paving streets in all incorporated cities and towns of more than three thousand inhabitants was established by the laws of 1852. R. S. 1852, p. 203, Secs. 62-63.

Again, this basis of apportionment is approved in R. S. 1888, Secs. 61-63.:

Annotated Ind. Stats., 1897, p. 292, Sec. 3541. The common council shall have power to enforce ordinances,

Forty-sixth: "To regulate the planting, maintaining and protection of shade trees along the streets and in the public grounds, and to compel the owners of lots bordering on any street or part thereof to plant, maintain and protect trees, and on failure to do so, to cause the same to be done: and the expense thereof shall be a lien on such property and collected in the same manner as street improvements."

Annotated Ind. Stats., 1897, p. 296, Sec. 3597, provides:

"That in all cities of this state which have a population of less than 35,000 inhabitants, as shown by the last preceding United States census, whenever the common council of any such city shall desire to construct sewers or make sewer improvements, and whenever any such sewer shall from its size and character be intended and adapted only for local use by property holders along the line of the street or alley on which it is constructed, and in the opinion of such common council is not intended or adapted for receiving sewerage from collateral drains, then, and in that case, the whole cost of the improvement shall be paid for by the property holders abutting on such street or alley in the same manner and to the same extent as street improvements are paid for, except that such city shall not be liable for the portions of such local sewer which cross other streets or alleys, but the total cost shall be apportioned *pro rata* against property holders: provided, however, that any part or all of the cost of such improvement may be ordered by such common council, if it deem the same expedient, to be paid out of the general fund of such city."

IOWA:

Code of Iowa, 1897, p. 334, Ch. 7, Sec. 792, provides:

"Cities shall have power to improve any street, highway, avenue or alley by grading, parking, curbing, paving, graveling, macadamizing and guttering the same or any part thereof, and to provide for the making and reconstruction of such street improvements, and to assess the costs on abutting property as provided in this chapter."

Page 342, Ch. 7, Sec. 818:

"The cost of opening, widening, extending and grading any street, highway, avenue, alley, public ground or market place shall be paid in whole or in part from the grading fund. The cost of making or reconstructing any street improvement authorized in this chapter, except that embraced in the preceding section (referring to payment for work on street intersections), and that hereinafter provided to be paid by and assessed to railways or street railways, shall be assessed as a special tax against the property abutting thereon, in proportion to the number of linear front feet of each parcel so abutting."

Page 342, Sec. 819:

"The cost, or any part thereof, of making or reconstructing sewers, including that provided for in the second preceding section, may be paid from the district sewer fund of the sewer district in which the same is situated, or from the city sewer fund, or from the general revenue, and the portion thereof not so paid, and not in excess of three dollars per linear foot of sewer, shall be assessed against the property abutting on such sewer in proportion to the number of linear front feet of each parcel thereof, and upon ad-

3398

jacent property in proportion to the benefit thereto; but in estimating the benefits to result therefrom to adjacent property, no account shall be taken of improvements, and each lot or parcel of land shall be considered as wholly unimproved. The city may combine any or all of said methods of assessment."

KANSAS:

Gen. Stats. Kans., 1897, Chap. 32, Art. 8, Sec. 163:

"For all paving, macadamizing, curbing and guttering of streets and alleys, the assessment shall be made for the full cost thereof on each block separately; on all lots and pieces of ground to the center of the block on either side of such street or avenue, the distance improved or to be improved, or on the lots or pieces of ground abutting on such alley, according to the assessed value of the lots or pieces of ground without regard to the buildings or improvements thereon, which value shall be ascertained by three disinterested appraisers appointed by the mayor and council."

Sec. 179. "For making and repairing sidewalks, the assessment shall be made on all lots and pieces of ground abutting on the improvement according to the front foot thereof."

The foregoing sections apply to cities of the first class. The same rule is enforced by cities of the second class.

Gen. Stats. 1897, p. 428, Ch. 37, Art. 8, Sec. 120.

Cities of the first class are those having over 15,000 population.

Cities of the second class are those having between 2,000 and 15,000 population.

Cities of the third class are those having less than 2,000 population.

In cities of the third class the cost of paving is required to be assessed according to the front foot.

Gen. Stats. 1897, p. 457, Chap. 38, Art. 5, Sec. 53.

The acts incorporating the following cities in Kansas authorize the municipal authorities to improve the roadways or sidewalks of streets and to levy special taxes on the holders of the lots on such streets according to their respective fronts or assessed values to pay for the same.

Atchison--Private Laws of Ter. of Kans., 1857-58, p. 172, Sec. 11. The cost of paving was made chargeable according to the assessed value of lots while sidewalk construction and repairs were to be assessed against lots fronting thereon according to the front feet. Laws of Kans., 1886, p. 120, Sec. 1.

Lawrence—Private Laws of Ter. of Kans., 1857-58, p. 187, Sec. 8. See also Private Laws of Ter. of Kans., 1860, p. 130, Sec. 57.

Paola—Private Laws of Ter. of Kans., 1860, Chap. 81, p. 192, Art. 6, Sec. 20.

Laws of Kans., 1867, Chap. 68, p. 107, Art. 3, Sec. 1, is applicable to all cities of the second class containing more than one thousand and less than fifteen thousand inhabitants, and provides that "For making and improving sidewalks the assessment shall be made on all lots or pieces of ground fronting on the improvement according to the front feet thereon."

KENTUCKY:

Cities are divided into six classes according to population, with powers conferred by general laws, so that cities of the same class possess the same powers. Ky. Stat., 1894, p. 128.

Cities of the first class, Ky. St., 1894, p. 977.

Sec. 2833. "When the improvement is the original construction of any street, road, lane, alley or avenue, such improvement shall be made at the exclusive cost of the owners of lots in each fourth of a square, to be equally apportioned by the board of public works according to the number of square feet owned by them respectively, except the certain lots (say thirty feet front and extending back as may be prescribed by ordinance) shall pay 25 per cent more than others for such improvements. Each subdivision of territory bounded on all sides by principal streets shall be deemed a square. When the territory contiguous to any public way is not defined into squares by principle streets, the ordinance providing for the improvement of such public way shall state the depth on both sides fronting said improvement, to be assessed for the cost of making the same according to the number of square feet owned by the parties respectively within a depth as set out in the ordinance."

Sec. 2835. "The cost of making sidewalks, including curbing, whether by original construction or reconstruction, shall be apportioned to the front foot, as owned by the parties respectively fronting said improvement, except that each corner lot shall pay the cost of its sidewalk intersection."

In cities of second class original construction is at the exclusive cost of abutting property owners.

Ky. St., 1894, p. 1054, Sec. 3096.

Cost of sewers apportioned by front foot rule, Sec. 3105.

Cities of third and fourth classes pay for paving by front foot rule.

Ky. St. 1894, p. 1132, Secs. 3449, 3564.

Cities of fifth and sixth classes pay for sidewalk and curbing by front foot rule; Secs. 3643, 3706.

The Charter of City of Louisville, Ky., 1873, Sec. 2, relating to assessments for the original construction of public ways, provides that,

"* * * such improvement shall be made at the exclusive cost of the owners in each fourth of a square, to be equally apportioned by the General Council according to the number of square feet owned by them respectively."

LOUISIANA:

Rev. Laws of La., 1884, Sec. 1, p. 570, provides:

"That the municipal authorities of any town or city in this state (the City of New Orleans excepted) shall have the power to open and extend, pave, plank, gravel, macadamize or otherwise improve the streets, alleys or other public highways within the corporate limits, and shall have the power to levy and collect special taxes on real estate abutting the street, alley or other public highway to be improved, for the purpose of defraying a part of the cost of such work or improvement, as hereinafter provided."

Sec. 3, p. 571:

"The council shall provide by ordinance for an assessment of all real estate abutting the street, alley or highway, or portion thereof, to be paved or otherwise improved, in such manner as to apportion two-thirds of the contract price on the basis of the respective frontage of the real estate so abutting" (Amended by Act 145, 1894).

MARYLAND:

Public Local Laws of Md., 1888, p. 545, Sec. 810.

In Baltimore the Mayor and Council are empowered as follows:

"They shall have and are vested with full power and authority to provide by ordinance for the grading, shelling, graveling, paving and curbing, or for the regrading, reshelling, regraveling, repaving and recurbing of any street, lane or alley in said city, or part thereof, now condemned, ceded or opened as a public highway, or which may hereafter be condemned, ceded, opened, widened, straightened or altered, according to the laws and ordinances regulating the same; and also for assessing the costs of any work, in whole or in part, pro rata upon the property binding on such street, lane or alley, or part thereof, and for collecting such assessments as other city taxes are collected."

MASSACHUSETTS:

Pub. Stats. 1882, pp. 342-43, Ch. 50, Secs. 20-22, authorize cost of sidewalks to be charged according to the front foot rule.

MICHIGAN:

Howell's Annotated Stats., 1882, Vol. 1, Secs. 2629, 2630, 2636. After empowering cities to improve streets it is provided:

Sec. 2629. "Such part of the expenses of improving any street, lane or alley, by grading, paving, planking, graveling, curbing or otherwise, and of repairing the same as the council shall determine, may be paid from the general street fund, or from the street district fund of the proper street district, or in part from each; or the whole or such part of the expense of such improvement as the council shall determine may be defrayed by special assessments upon lots and premises included in a special assessment district, to be constituted of the lands fronting upon that part of the street or alley so improved or proposed so to be, or constituted of lands fronting upon such improvement, and such other lands as in the opinion of the council may be benefited by the improvement."

Sec. 2630. "When expenses for any such improvement or repairs shall be assessed in a special assessment district, and there shall be lands belonging to the city, school buildings, or other public buildings, or public grounds not taxable, fronting upon such improvement such part of the expense of such improvement as in the opinion of the council or board of assessors making a special assessment would be justly apportionable to such public grounds, buildings and city property, and to any interior squares or spaces formed by the intersection of streets, were they taxable, shall be paid from the general street fund, or from the proper street district fund, or partly from each, as the council shall determine to be just, and the balance of such expenses shall be assessed upon the taxable lots and premises included in the special assessment district, *in proportion to their number of feet frontage upon such improvement*, or if the special assessment district shall include other lands not fronting upon the improvement, then upon all the lands included in such special assessment district, in proportion to the estimated benefits resulting thereto from the improvement. When such assessment is to be made upon lots in proportion to their frontage upon the improvement, if from the shape or size of any lot an assessment thereon in proportion to its frontage would be unjust and disapportionate to the assessments upon other lots, the council or board of assessors making the assessment may assess such lot for such number of feet frontage as in their opinion will be just."

Sec. 2636. "The city council shall have * * * power to construct and maintain sidewalks and crosswalks in the public streets and alleys and charge the expense thereof upon the lots and premises adjacent to and abutting upon such walks."

MINNESOTA:

Stats. of Minn., 1894, Vol. 1, p. 299, Secs. 1116, 1117, 1119, p. 314, Secs. 1179, 1180:

Sec. 1116. "All cities in the State of Minnesota are hereby authorized to levy assessments for local improvements upon the property fronting upon such improvements without regard to cash valuation."

Sec. 1117. "Such assessment may be made by any city in the state for paving, curbing, graveling, macadamizing and planking any street, lane, alley or highway, and the expense of such improvement may be defrayed by an assessment upon the real estate fronting thereon, to be levied in the manner hereinafter prescribed."

Sec. 1119. "The expense of any such improvement shall be chargeable to and assessed upon the lots and parcels of land abutting upon the street, lane, alley or highway in which such improvement is contracted to be done, upon the basis of an equal sum per front foot of each lot or parcel, measuring along the line of such improvement; provided if two or more improvements are included in one contract, the expense of each improvement shall be separately apportioned and assessed upon the lots and parcels of land abutting upon such improvement, but two or more improvements may be included in one assessment proceeding."

Sec. 1179. "Whenever the common council shall deem it necessary to construct or repair any sidewalk in said city, they shall require the street commissioner to notify all owners and occupants of any lot or lots, or parcels of land adjoining such sidewalk, to construct or repair the same at his or their own proper expense and charge, within a time designated by the publication in the official paper of said city, for not less than two weeks, of a notice to said owners or occupants, setting forth what work is to be done, and the character of the same, by such owners or occupants, and the time within which they are required to do the same."

Sec. 1180. "If such work is not done, and the said sidewalks are not built or repaired in the manner and within the time prescribed, the common council may order the same to be done by the street commissioner, at the expense of the lots and parcels of land adjoining said sidewalks, and said expense shall be assessed upon such lots and parcels of land so chargeable by the street commissioner and returned by him to the common council. And assessment so made and returned, if approved by the common council, shall become a lien upon said lots and parcels of land, as in case of city, county and state taxes."

MISSISSIPPI:

Annotated Code of Miss., 1892:

Sec. 3011. "When the mayor and board of alderman shall deem an improvement which requires unusual outlay and costs in excess of the general improvement fund, of which the board shall be the judge, on any street, lane, alley, avenue or sidewalk, or part thereof, necessary, a special tax therefor may be levied."

Sec. 3012. "If the owner of the property fail to make the special improvement within twenty days after the ordinance becomes operative, then the street commissioner shall, upon order of the board, after giving five days notice to the owner or occupant of each piece of the property to be assessed, or in case of unoccupied property, by posting a written notice thereon for such time, of the necessity therefor, make the repairs or construct the improvement, or cause it to be done, keeping an account of the cost thereof, and reporting the same to the board at its next regular meeting thereafter for assessment; and each lot or piece of ground abutting on said street, alley, lane, avenue or sidewalk, or part thereof, shall be liable and bound by a lien paramount to all other liens, state and county taxes excepted, for the cost of the improvements or repairs made along or in front of such lot or piece of ground, as reported to and approved by the board, with ten per centum interest thereon from thirty days after its approval, which may be enforced in the chancery court after ten days notice to the owner, if a resident, or to the occupant of the property, or agent, if the owner be non-resident, and when so enforced a solicitor's fee to be fixed by the court shall be taxed in the costs in the complainant's favor."

This is a general law applicable to all cities and towns of the state.

MISSOURI:

The numerous statutes of this state in which the assessment laws have been developed are cited in the first part of this brief. (pp, 16-20).

MONTANA:

Mont. Code, 1895, Vol. 1, p. 713.

Sec. 4887. "The cost of paving, curbing, guttering, sidewalk and all material for the roadways or the sidewalks must be charged upon the adjoining or abutting property as a special tax or assessment, and collected and paid as hereinafter provided."

Sec. 4888. "Whenever the estimated special taxes or assessments for paving, curbing, guttering or sidewalks to be assessed against any property in the aggregate amount to more than twenty-five per cent of the assessed value of the property, then the council must provide, out of the general fund, for the pavement of the amount in excess of said twenty-five per cent."

Sec. 4895. "When a district sewer is fully completed the council must cause to be computed the whole cost thereof, and must assess it as a special tax against all the lots of ground in the district respectively, without regard to improvements, and in proportion as their respective areas bear to the area of the whole district, exclusive of streets, alleys and other city or town property."

This is a general law applicable to all cities.

NEBRASKA:

Metropolitan cities, 80,000 or more. Comp. Sts. Neb., 1897, p. 177.

Sec. 889. "The cost of improving the streets and alleys within any improvement district, except the paving of intersections of streets and spaces opposite alleys within such district, shall be assessed upon the lots and lands abutting upon the streets and alleys in such district in proportion to the feet front so abutting upon such streets and alleys."

Sec. 901. "All special taxes to cover the cost of any public improvements herein authorized, shall be levied and assessed on all lots, parts of lots, lands and real estate bounding, abutting or adjacent to such improvement, or within the district created for the purpose of making such improvement, to the extent of the benefits to such lots, parts of lots, lands and real estate by reason of such improvement; such benefits to be determined by the council sitting as a board of equalization, after publication of notice to property owners as herein provided, and in cases where the council, sitting as a board of equalization, shall find such benefits to be equal and uniform, such assessment may be according to the foot frontage, and may be pro rated and scaled back from the lines of such improvement according to such rules as the board of equalization shall consider fair and equitable; and all such assessments and findings of benefits shall not be subject to review in any legal or equitable action, except for fraud, gross injustice or mistake. Provided, that when any public improvement shall extend into or through any unsubdivided tract or parcel or parcels of land, said taxes shall be levied so as not to charge against the real estate adjoining such improvement for a greater depth than the average distance through the subdivided real estate to be taxed for said purpose."

NEW MEXICO TERRITORY:

Compiled laws 1884:

Sec. 1622. "The city council and board of trustees in towns shall have the following powers: * * *

81. "To levy annually, by ordinance, and collect a frontage tax on all lots fronting on water mains in towns or cities having waterworks owned by such towns or cities."

Compiled Laws New Mexico, 1897, p. 627:

Sec. 80. "That municipal corporations may assess for street improvements, such as paving, grading, curbing and other work done and material furnished therefor, between sidewalks or opposite sides of said streets, the whole or a portion of the cost of such improvements upon the lots adjoining said streets and especially benefited thereby, according to the frontage of said lots and land, whether said frontage be as to width or depth of said lots and lands."

Sec. 81. "That municipal corporations shall have the power

33992

to order pavements and sidewalks and repair of same, and upon failure of the owners or persons in charge of the property adjoining said pavements and sidewalks to comply with such order within a time reasonably prescribed, the city council or board of trustees may have the same done and assess the cost thereof upon said adjoining property."

This is a general law applicable to all cities organized under it.

NEW YORK:

The laws of New York, incorporating the following cities and towns, grant the power to the mayor and council to pave streets and to assess the whole or a stated portion of the cost of that work against the lots abutting upon the improvement according to the frontage of the lots thereon. These statutes, generally speaking, require the cost of intersections to be paid out of the general treasury.

Dunkirk.—Laws of N. Y., 1894, Vol. 1, p. 545, Chap. 303, Sec. 5.

Elmira.—Laws of N. Y., 1895, Vol. 2, p. 518, Chap. 371, Sec. 26.

Hornellsville.—Laws of N. Y., 1894, Vol. 1, p. 670, Chap. 347, Sec. 1. In this city every street railroad operated therein is required to pay the cost of paving the space covered by its road and one foot in width outside of and adjoining its tracks.

Jamestown.--Laws of N. Y., 1894, p. 243, Chap. 121, Sec. 1. See also Laws of N. Y., 1895, Vol. 2, p. 876, Chap. 496, Sec. 14. See also Laws of N. Y., 1896, Vol. 2, p. 1085, Chap. 815, Sec. 2.

Kingston.—Laws of N. Y., 1896, Vol. 2, p. 909, Chap. 747, Sec. 149, requires the entire expense of constructing and repairing sidewalks to be assessed and levied against the adjoining property in proportion to the lineal feet fronting thereon.

Niagara Falls.—Laws of N. Y., 1896, Vol. 2, p. 1173, Chap. 898, Sec. 17.

Poughkeepsie.—Laws of N. Y., 1896, Vol. 2, p. 465, Chap. 425, Secs. 111-117.

Schnectady.—Laws of N. Y., 1862, Chap. 385, as amended by Chap. 294, Laws of N. Y., 1890, Chap. 190, Sec. 59, Laws of N. Y., 1893, requires the cost of a street pavement to be apportioned among the lands abutting on the street according to the number of feet frontage on the same.

Utica.—Laws of N. Y., 1894, Vol. 1, p. 890, Chap. 437, Sec. 99.

Watertown.—Laws of N. Y., 1895, Vol. 2, p. 1424, Chap. 646, Sec. 1.

Yonkers.—Laws of N. Y., 1895, Vol. 2, p. 1327, Chap. 635, Sec. 19, requires the cost of paving and guttering along streets to be assessed "upon the lots of land that shall front upon such street or highway, and in proportion to their respective frontages thereon."

Burghampton.—Laws of N. Y., 1895, Vol. 2, p. 1810, Chap. 858, Sec. 41, authorizes the common council to levy a tax of eighty cents per lineal foot upon the line of the street upon which a sewer shall be constructed, to pay costs of such sewer.

NORTH DAKOTA:

Rev. Code of N. D., 1895:

Sec. 2279. "When the city council shall deem it necessary to open, widen, extend, grade, pave, macadamize, bridge, curb, gutter, drain or otherwise improve any street, alley, avenue, lane or highway, or other public grounds within the city limits, or extend or improve any public system of waterworks exclusively owned and operated by the city, for which a special assessment is to be levied, as herein provided, the city council shall, by resolution, declare such work or improvement necessary to be done, and such resolution shall be published for four successive weeks at least once a week in the official newspaper of the city, and if a majority of the owners of the property liable to be assessed therefor shall not, within twenty days after the expiration of such publication, file with the city auditor a written protest against such improvement, then the city council shall have power to cause such improvement to be made and to contract therefor, and to levy and assess the assessment as herein provided, and all work done under this section shall be let by contract to the lowest responsible bidder therefor."

Sec. 2280. "Whenever any work or improvement mentioned in the preceding section shall have been determined upon, and the contract let therefor, the city engineer shall forthwith calculate the amount to be assessed for such improvement for each lot or parcel of ground abutting or bounding upon such improvement. And in estimating the assessment he shall take the entire cost of such improvement and divide the same by the number of feet fronting or abutting upon the same, and the quotient shall be the sum to be assessed per front foot so bounding or abutting, and said estimate shall be filed with the city auditor and shall be presented to the city council for its approval at the first meeting held thereafter. The city auditor shall cause said estimate of the city engineer, together with a notice of the time and place when the council will meet to approve of the same, to be published in the official newspaper of the city for at least ten days prior to the meeting of the city council to approve the same."

This is a general law.

OHIO:

Bates, Ann. Ohio Stats., 1897, Vol. 1, Secs. 2264, 2379.

With certain exceptions the general laws of Ohio confer upon the larger cities of that state the power to assess the cost of street improvements, including paving, on the abutting and such adjacent and contiguous or other benefited lots or lands in the corporation, either in proportion to the benefits which may result from the improvement or according to the value of the property assessed, or by the foot front of the property bounding or abutting upon the improvement, as the council, by ordinance, setting forth specifically the lots and lands to be assessed, may determine before the improvement is made.

Sec. 2379. "The council shall provide for assessing the cost and expenses of constructing main sewers, upon the lots and lands bounding or abutting streets, lanes, alleys, highways, market spaces, public landings and commons, in or along which the same shall pass, by the feet front, or according to the valuation of the same on the tax list, or according to benefits, as it may determine."

Same method prescribed in R. S. Oh., 1894, Vol. 1, Sec. 2264.

In cities of the first grade of the second class (such as Columbus), the cost of street pavement shall be assessed equally by feet front upon the property fronting or abutting on the improvement.

R. S. Oh., 1894, Vol. 1, Sec. 2356.

OKLAHOMA:

Stats. of Ok., 1893, p. 166, Sec. 561. In cities of the first class assessments are made:

> "For paving, macadamizing, curbing and guttering all streets; * * * the assessment shall be made for each block separately, on all lots and pieces of ground to the center of the block on either side of such street or avenue, the distance improved or to be improved, or on the lots or pieces of ground abutting on such alley according to the assessed value of the lots or pieces of ground, without regard to the buildings or improvements thereon; which value shall be ascertained by three disinterested appraisers appointed by the mayor and council."

All other cities pay for street improvements according to the front foot rule. Stats. Ok., 1893, p. 192, Sec. 682.

OREGON:

Sess. Laws, 1898, p. 150, Sec. 138. In the City of Portland the cost of street improvements are assessed thus:

> "Each lot or part thereof within the limits of a proposed street improvement abutting on the street shall be liable for the full cost of making the same upon half the street in front of and abutting upon it, and also of a proportionate share of the cost of improving the intersections of two of the streets bounding the block in which such lot or part thereof is situated." The cost of the intersection to be distributed on adjacent lands upon a scale fixed with reference to their distance from the intersection.

The same rule of assessment has obtained since 1864.

PENNSYLVANIA:

Philadelphia may assess cost of street pavement by the front foot rule.

3399

B. & P. Digest, Vol. 1, p. 1516, Sec. 153; *Piper & Lewis Digest*, 1894, Vol. 1, p. 622.

Cities of the third, fourth and fifth classes are authorized to pave any public street or part thereof, and to provide for the collection of the cost of the same from the owners of real estate bounding or abutting thereon, by an equal assessment on the property in proportion to the number of feet the same fronts on the street or part thereof to be improved. Laws Pa. 1889, p. 277, Art. 5, Sec. 3; *Piper & Lewis Digest*, 1894, Vol. 1, p. 622.

City authorities are authorized to construct sewers and provide for the payment therefor from the general revenue, or by assessments upon property abutting thereon, according to frontage, according to the assessed value of such property, or in proportion to benefits upon the lands benefited by such sewers as the council shall in each case determine. Laws Pa. 1889, p. 277, Art. 13, Sec. 1; *Brightley's Purdon's Digest*, 1883, Vol. 2, p. 1221, Sec. 62.

All cities in this commonwealth have the power to grade, pave, curb and otherwise improve any public street, or any part thereof, within the corporate limits, and pay therefor in assessments to be determined as now provided by law in reference to the payment of costs, damages and expenses of public improvements within municipal corporations. Laws Pa. 1895, p. 105, Sec. 2.

SOUTH DAKOTA:

Stats. S. D. 1889, Vol. 1, p. 445.

Sec. 1392. "When the city council shall deem it necessary to open, widen, extend, grade, pave, macadamize, bridge, construct a viaduct, curb, gutter, drain, lay or extend its water mains, or otherwise improve any street, alley, lane, avenue or highway, or other public grounds within the city limits, for which a special assessment is to be levied as herein provided," etc.

Sec. 1393. "Whenever any work or improvement mentioned in the preceding section shall have been determined upon, and the contract let therefor, the city engineer shall forthwith calculate the amount to be assessed for such improvement, for each lot or parcel of ground abutting or abounding upon such improvement, and in estimating the assessment, he shall take the cost of such improvements fronting on the property to be assessed, and divide the same by the number of feet fronting or abutting upon the same, and the quotient shall be the sum to be assessed per front foot so abutting."

Sewers are also paid for by assessments according to front foot rule. Stats. S. D., 1889, p. 457, Sec. 1438.

TEXAS:

Rev. Stats. 1895, p. 142, Ch. 9:

Sec. 544. "The city council shall be invested with full power and authority to grade, gravel, repair, pave or otherwise improve any avenue, street or alley, or any portion thereof, within the limits of said city, whenever by a vote of two-thirds of the aldermen present they may deem such improvement for the public interest; provided, the city council pay one-third and the owners of the property two-thirds thereof, except at the intersection of the streets, from lot to lot across the streets either way, shall be paid for by the city alone; and said costs shall be assessed on the property fronting on said streets so improved, to be collected in equal annual payments, not less than five in number, and all moneys collected from these assessments shall be appropriated exclusively to the payment of the bonds issued for the payment of the cost of said improvement."

Sec. 545. "Whenever the city council shall determine to make any such improvement, they shall cause an estimate to be made of the probable cost thereof by the city engineer, or by some other officer of the city, or by a committee of three aldermen; and such engineer or other officer or committee shall also report a full list of lots or fractional lots, giving number and size of the same, and the number of the block in which situated, and the names of the owners thereof, if known, and such other information as may be required by the city council, and if there be any lot or fractional lot, the owner of which is unknown, the same shall be entered on said list as unknown; it shall be the duty of the officer or committee aforesaid to enter on said list opposite each lot or fractional lot lying and being on each side of the street, avenue or alley so to be improved as aforesaid, one-third of the estimated expense of such work or improvement on such avenue, street or alley, fronting, adjoining or opposite such lot or fractional lot; and on the acceptance and approval of said report and list by the city council, said amount shall be imposed, levied and assessed as taxes, and shall be a lien upon the property until the payment of the same."

33995

UTAH:

Rev. Stats. 1898, p. 143:

Sec. 257. "The cost of paving, macadamizing or repaving of the streets and alleys within any district, except the intersection of streets and space opposite alleys within such district, shall be assessed upon the lots and lands abutting upon the streets and alleys in such district, in proportion to the square feet, or feet front, or both, so abutting upon such streets and alleys."

This law applies to every city in the state.

WASHINGTON:

Ballinger's Annotated Codes and Stats., 1897, p. 239, Sec. 943, authorizes cities to establish local improvement districts which shall include all the property fronting on the street within the distance to be improved, and the cost of the work shall be taxed and assessed upon all the property in such local improvement district, which cost shall be assessed in proportion to the number of feet of such lands and lots fronting thereon, and included in said improvement district, and in proportion to the benefits derived from such improvement. Provided, that the city council may expend from the general fund for said purposes such sums as in their judgment may be fair and equitable in consideration of benefits accruing to the general public by reason of such improvements.

WEST VIRGINIA:

Cities may require all male residents of the city over twenty-one and under fifty years of age to work two days annually on the streets;

May charge cost of sidewalks and gutters to abutting property. Code W. Va., 1891, p. 427, Sec. 32, p. 428, Sec. 34.

WISCONSIN.

Wis. Stats., 1898, Vol. 1, p. 688.

Sec. 925. "In any city, whenever the owners of more than one-half of the frontage of lots upon that part of any street proposed to be improved shall petition the common council to improve such street or part of street by stone paving, macadam, or otherwise, as set forth, to be made in such manner as shall be fully specified by the city surveyor and approved by the mayor, and upon advertisement setting forth clearly such specifications, such city may contract for such work to be done by the lowest responsible bidder, if deemed reasonable in cost, or in case of macadam it may have the work done by men in the employ of the city, provided that such improvement, unless made to connect with streets somewhat similarly improved, shall be made to extend upon such street not less than the length or width of three blocks of lots and the street crossings between. The cost of such improvement, when made, shall be asssessed to the respective owners of the lots fronting on such street in the ratio of each owner's number of feet front to the entire length of such improvement, exclusive of street crossings, which shall be chargeable to the city as its proportion of expense, and such crossings shall be made to conform with the street so improved. The word street, as herein used, may be construed to mean two more streets when the whole taken together would form one continuous drive."

Cost of sewers may be assessed by front foot rule. Wis. Stats., 1898, Vol. 1, p. 700, Sec. 935.

WYOMING:

Rev. Stats., 1887, Wy., p. 107, Sec. 191.

Cheyenne has power under its charter as follows:

"For paving, macadamizing, curbing and guttering all streets and avenues, and excavating, grading and filling for the same, and for all improvements for the squares or areas formed by the crossing of streets and for the construction of sewers, the assessment shall be made on all lots and pieces of ground to the center line of the block extending along the street or avenue the distance improved or to be improved according to the assessed value of the lots or pieces of ground, without regard to the buildings or improvements thereon."

Laramine has same law, R. S. Wy., 1887, p. 125, Sec. 3.

ENGLAND:

Chitty's English Statutes, Vol. 10; Public Health, p. 50; 38 and 39 Vict., c 55.

Sec. 150. "Where any street within any urban district (not being a highway repairable by the inhabitants at large) or the carriageway, footway or any other part of such street is not sewered, levelled, paved, metalled, flagged, channelled and made good, or is not lighted to the satisfaction of the urban authority, such authority may, by notice addressed to the respective owners or occupiers of the premises, fronting, adjoining or abutting on such parts thereof as may require to be sewered, levelled, paved, metalled, flagged or channelled, or to be lighted, require them to sewer, level, pave, flag, channel or make good or to provide proper means for lighting the same within a time to be specified in such notice.

If such notice is not complied with, the urban authority may, if they think fit, execute the works mentioned or referred to therein, and may recover in a summary manner the expenses incurred by them in so doing, from the owners in default according to the frontage of their respective premises and in such proportion as is settled by the surveyor of the urban authority, or (in case of dispute) by arbitration in manner provided by this act; or the urban authority may by order declare the expenses so incurred to be private improvement expenses.

The same proceedings may be taken and the same powers may be exercised in respect of any street or road of which a part is, or may be a public footpath or repairable by the inhabitants at large as fully as though the whole of such street or road was a highway not repairable by the inhabitants at large."

Chitty's English Stats., Vol. 10, Public Improvements, p. 14; 10 and 11 Vict., c. 34.

53. "If any street, although a public highway at the passing of the special act, have not theretofore been well and sufficiently paved and flagged, or otherwise made good, the commissioners may cause such street, or the parts thereof not so paved and flagged or otherwise made good, to be paved and flagged in such manner as they think fit, and the expenses incurred by the commissioners in respect thereof shall be repaid to them by the occupiers of the lands abutting on such street, or such parts thereof as have not been heretofore well and sufficiently paved and flagged or otherwise made good, and such expenses shall be recoverable from such occupiers respectively as hereinafter provided with respect to private improvement expenses, and thereafter such street shall be repaired by the commissioners out of the rates levied under this or the special act."

LONDON:

Chitty's English Stats., Metropolis, 18 and 19 Vict., c. 120.

105. "In case the owners of the houses forming the greater part of any new street laid out or made, or hereafter to be laid out or made, which is not paved to the satisfaction of the vestry or district board of the parish or district in which such street is situate, be desirous of having the same paved, as hereinafter mentioned, or if such vestry or board deem it necessary or expedient that the same should be so paved, then and in either of such cases such vestry or board shall well and sufficiently pave the same, either throughout the whole breadth of the carriageway and footpaths thereof, or any part of such breadth, and from time to time keep such pavement in good and sufficient repair, and the owners of the houses forming such street shall on demand pay to such vestry or board the amount of the estimated expenses of providing and laying such pavement (such amount to be determined by the surveyor for the time being of the vestry or board), and in case such estimated expenses exceed the actual expenses of such paving, then the difference between such estimated and such actual expenses shall be repaid by the vestry or board to the owners of houses by whom the said sum of money has been paid, and in case the said estimated expense be less than the actual expense of such paving, then the owners of the said houses shall, on demand, pay to the said vestry or board such further sum of money as—together with the sum already paid—amounts to such actual expenses."

PROVINCE OF QUEBEC:

Rev. Stats. of the Province of Quebec, 1888, Vol. 2, Sec. 4458. Power is granted;

"To order the opening of new streets and the enlargement or alteration of existing streets;

To prescribe the mode of constructing and repairing the streets of the town, at the cost of the corporation or of the owners of adjacent lands, as the council may deem advisible, and according to such plans and conditions as it may deem suitable." 40 V., c. 29, s. 283.

PROVINCE OF ONTARIO:

Rev. Stats. Ontario, Vol. 2, Ch. 223, Local Improvements, 664. Authority is granted;

Sec. 664. "For assessing and levying, by means of a special rate, the cost of deepening any stream, creek or water course, and draining any locality, or the cost of making, enlarging or prolonging any common sewer, or of opening, widening, prolonging or altering, macadamizing, grading, levelling, paving or planking any street, lane, alley, public way or place, or of constructing any sidewalk, bridge, culvert or embankment forming part of a highway therein, or of curbing, sodding, or planking any street, lane alley, square or other place."

Sec. 665. "The special rate to be so assessed and levied shall be an annual rate according to the frontage thereof, upon the real property immediately benefited by the work of improvement. 55 V., c. 42, s. 613 (1); c. 43, s. 66; 59, V., c. 51, s. 28 (1)."

UNITED STATES:

Act of Congress of August 11th, 1894, 28 Stats. at Large, p. 275, Chapp. 253, provides;

"That hereafter assessments levied for laying water mains in the District of Columbia shall be at the rate of one dollar and twenty-five cents per lineal foot against the lots or land abutting upon the street, road or alley in which a water main shall be laid."

VI.

The decisions of the courts of twenty-seven States of the Union uphold the validity of the method of legislative acts assessing the cost of street improvements against abutting lots according to the frontage or area of the respective lots abutting upon the improvement, and establish the jurisdiction of the legislature so to do.

STATE DECISIONS SUSTAINING ASSESSMENTS BY FIXED RULE:

ALABAMA:

Irwin vs. Mayor etc., of Mobile (1876), 57 Ala., 7:

"The provisions of the charter of the City of Mobile, approved February 2nd, 1866, authorizing its authorities to improve streets at the expense of adjacent land owners, and to apportion the expense according to the front of such property on the street so improved, is a valid exercise of legislative power."

Mayor and Adermen of Birmingham vs. Klein (1889), 89 Ala., 461, overrules *Mobile vs. Dargan*, 45 Ala., 310, and *Mobile vs. R. R.*, 45 Ala., 322, and upholds the validity of an act "to authorize and empower the mayor and aldermen of Birmingham to improve the sidewalks of the City of Birmingham at the cost of parties whose property abuts such sidewalks."

CALIFORNIA:

In *Emery vs. San Francisco Gas Co.* (1865), 28 Cal., 345, San Francisco's method of apportioning costs of street pavements is thus stated in the opinion by SAWYER, J.:

"The great reform charter—the consolidation act of 1856—adopted from the front foot principle, and continued in force until 1859, when it was amended and an *ad valorem* apportionment adopted. After trying this system two years, and after having given each principle a fair trial, in 1861 the legislature again returned to the front foot principle, which had been in force from 1856 to 1859, the only instance of a return to a principle once tried and abandoned. And finally in 1862, after 12 years experience, the present principle of assessing upon the front foot was continued, and for reasons which must be presumed to have been satisfactory to the legislature. * * *

The result of our investigation is, that there is no restriction in our Constitution upon the power of the legislature, to impose assessments to defray the expenses of public improvements in the nature of grading and planking streets, upon the property supposed to be benefited thereby in any district designated by the legislature, or the proper officers of municipal government acting under authority of law. And that it is authorized to apportion the amount to be raised according to value, according to the benefits received, in proportion to frontage or the superficial conditions, or to adopt any principle of apportionment that can be referred to the general sovereign right of taxation. * * *

The matter rests, then, in the discretion of the legislature. But it is difficult to say which principle of apportionment would, upon the whole, most nearly approximate equality and do exact justice to all. It would not be difficult to show that the *ad valorem* principle might, in many instances, work monstrous injustice; and it may be questionable whether, upon the whole, it is not more unequal and unjust in its operation than the front foot, or any other mode of apportionment. In many cases either principle of apportionment would, doubtless, approximate equality and uniformity sufficiently near to answer all the purposes of justice. In some cases an apportionment according to benefits, and in others an *ad valorem* or front foot apportionment might better answer the ends of justice. But every principle upon which these burdens have been apportioned has been in turn attacked as unequal and unjust. * * *

It must be manifest to anyone who will reflect upon the subject, that any constitutional restriction upon the legislative discretion as to the principle upon which the apportionment shall be made would have been unwise in the extreme, not to say absolutely absurd."

The following decisions expressly uphold the front foot rule of assessing the cost of paving streets: *Whiting vs. Whackenbusch* (1880), 54 Cal., 306; *Whiting vs. Townsend* (1881), 57 Cal., 515; *Jennings vs. LeBreton* (1889), 80 Cal., 8; *Diggins vs. Hartshorn* (1895), 108 Cal., 154.

In *Jennings vs. LeBreton*, *supra*, this language is used:

> "Twenty-four years ago these questions were deliberately considered by this court and decided against the views of the learned counsel for appellants, in *Emery vs. San Francisco Gas Co.*, 28 Cal., 346, in which it was decided that the legislature may delegate to municipal corporations authority to assess real property to pay the expenses of local improvements, and to apportion the assessment in proportion to the frontage of the land assessed on the improvements; and that this is a constitutional mode of the exercise, by the legislature, of the sovereign right of taxation, which does not, in any degree, depend upon the right of eminent domain; nor involve the taking of private property for public use, in the sense of the constitutional prohibition.
>
> We are not aware that any of these propositions have been overruled or qualified; but understand that they have been repeatedly affirmed."

Since the Norwood case, *Hadley vs. Dague* (1900), 62 Pac. Rep., 500, adheres to the rule of the court's former decisions.

COLORADO:

The front foot or area rule has never been disavowed in Colorado. *Keese vs. City of Denver* (1887), 10 Colo., 112; *City of Pueblo vs. Robinson* (1889), 12 Colo., 593; *City of Denver vs. Knowles* (1892), 17 Colo., 204.

The following language is used in the opinion of HAYT, C. J., in the case last cited, in which the right of the city to levy a special assessment against abutting lands in proportion to the frontage to pay for paving and guttering a street was challanged:

"Different principles of apportionment have been adopted in different states, and sometimes in the same state at different times. In some way the cost of the improvement should be assessed upon the property in proportion to the benefit received by it. Absolute equality, however, cannot be expected. The duty of determining the mode to be adopted is peculiarly within the province of the legislative department of the government, and where substantial equality has been provided for, the courts will not interfere. By the act questioned, whenever paving or grading is ordered by the city authorities, one-third of the entire expense of the improvement in front of the lots must be borne by the city, together with all the expenses at street and alley intersections; the adjacent property being charged with only two-thirds of the cost of the grading or paving in front of the same. Thus, in proportion as the benefit was deemed a public one, the whole city is required to pay; the balance of the expense being made a charge upon the abutting property, receiving, as it does, a special benefit from the improvement. Probably no rule of apportionment that has yet been devised, is fairer than the one provided by this statute, when the assessment is against urban property."

DELAWARE:

English vs. Mayor of Wilmington, (1896) 2 Mar. 63.

The following propositions are supported by the decision in this case:

The act of April 29, 1891, providing that the cost of constructing a complete sewer system for a city shall be assessed on all property adjoining a sewer, or with access thereto, at a fixed and uniform rate per foot of frontage, and per square foot of area to a certain depth, is a valid exercise of legislative discretion in assessing benefits.

The statute does not deprive the assessed abutters of their property without due process of law becaues it does not provide for notice and hearing before the assessment is levied.

In an admirable opinion by Chancellor NICHOLSON, in which are reviewed the authorities, it is said:

"It is altogether too late in the development, both by legislation and elaborate judicial decisions, in states other than our own, of the general principles controlling local assessments for local improvements, for it to be necessary or proper for me to enter into a more elaborate or detailed review of the multitude of authorities

33999

sustaining the general propositions already laid down. It is well settled law (1) that the whole subject of taxing districts belongs to the legislature; (2) that the apportionment between the public and local owners is within the power of the legislature; (3) that the legislature may fix upon the basis of apportionment between individuals. In fixing upon the basis of apportionment, the two methods between which a choice is commonly made in statutes providing for local assessments are: (1) An assessment made by assessors or commissioners appointed for the purpose under legislative authority, who are to view the estates and levy the expense in proportion to the benefits which, in their opinion, the estates, respectively, will receive from the work proposed; (2) an assessment by some definite standard fixed upon by the legislature itself, and which is applied to estates by a measurement of length, quantity or value: *Cooley Tax'n.* p. 448. The principal is the same in either case, and is concisely expressed by Chief Justice SHAW in one of the early American cases, *Wright vs. City of Boston*, 9 Cush., 241, in language which has been universally quoted, both with and without crediting him with it. He says: 'Those who enjoy the benefit shall equally bear the burden.' And again: 'The benefits actually or presumptively received support the tax.' And elsewhere in the same case, which was a sewer case: 'The potentiality of receiving a benefit from a sewer is the thing to be charged with the tax.' It is obvious that the essential difference between the two methods of apportionment is that when the legislature adopts the latter method it decides itself the proportion in which the estates, respectively, will be benefited; as when it determines that the frontage or area of abutting lots, or both combined, shall constitute the measure of a sewer assessment. If the legislature has exercised its power bona fide, it must necessarily have considered all the circumstances surrounding the particular case, and have decided that, all things considered, such a measure would prove as nearly just and equal in its actual operation as any practicable method could be."

GEORGIA:

O'Reilly vs. Kingston (1886), 39 Hun., 285; *Haden vs. Atlanta* (1883), 70 Ga., 817; *Bacon vs. Savannah* (1890), 86 Ga., 301.

The opinion in the case last cited was rendered by Chief Justice BLECKLEY, in which it is said:

"The act by implication authorizes, and the ordinance prescribes, apportionment according to lineal frontage on the street improved and without any reference to the depth, superficial area or estimated value of the various parcels of abutting property. The language of the act is: 'And to assess two-thirds of the cost * * * on real estate abutting on each side of the street or lane improved.' The ordinance makes the assessment and requires it to be apportioned 'according to frontage.' It has been held that a city charter which required 'the assessors to assess each lot deemed to be benefited in proportion to the benefits they deem it to receive' is well executed, where the assessment was actually made on the lots in proportion to their frontage, notwithstanding some of them had valuable buildings, others had buildings of inferior value and many were vacant."

ILLINOIS:

In *White vs. People* (1880), 94 Ill., 604, it is said:

"Whether or not the special tax exceeds the actual benefit to the lot is not material. It may be supposed to be based on a presumed equivalent. The city council have determined the frontage to be the proper measure of probable benefits. That is generally considered as a very reasonable measure of benefits in the case of such an improvement."

In *Craw vs. Tolon* (1880), 96 Ill., 255, the court say:

"Special taxation, as spoken of in our constitution, is based upon the supposed benefit to the contiguous property, and differs from special assessments only in the mode of ascertaining the benefits. In the case of special taxation, the imposition of the tax by the corporate authorities is of itself a determination that the benefits to the contiguous property will be as great as the burden of the expense of the improvement, and that such benefits will be so nearly limited, or confined in their effect, to contiguous property, that no serious injustice will be done by imposing the whole expense upon such property."

Enos vs. Springfield (1885), 113 Ill., 65; *Sterling vs. Galt* (1886), 117 Ill., 11; *Springfield vs Green* (1887), 120 Ill., 269.

In *Davis vs. City of Litchfield* (1893), 145 Ill., 313, the court says:

"Special taxation is like a special assessment, lawfully imposed only upon the theory that the benefits conferred equal the burden imposed. A special tax, like a general tax, must be levied for a public purpose, must be uniform as to persons and property within the taxing district, and must be laid according to some fixed rule of apportionment."

In *Lightner vs. City of Peoria* (1894), 150 Ill., 80, the court say:

> "By this statute the city council is expressly authorized to determine that the improvement shall be made and paid for by special taxation of contiguous property, and unless there has been a clear abuse of the power and discretion conferred upon the city council, the courts are powerless to interfere."

Ware vs. City of Jerseyville (1895), 158 Ill., 234; *Payne vs. Village of South Springfield* (1896), 161 Ill., 285:

In the opinion in the case last cited it is said:

> "That grading or paving a street and the laying of sidewalks are local improvements, to pay for which a special tax may be levied upon contiguous property, in proportion to frontage, has been the law of this state since the decision in *White vs. People*, 94 Ill., 604. * * * The city council have determined the frontage to be the proper measure of property benefits. That is generally considered as a very reasonable measure of benefits in the case of such improvements. * * * This doctrine has been assailed time and time again, but never departed from by this court. * * * If it be possible to settle any question by repeated decisions, all the same way, the present surely ought to be regarded as finally and irrevocably settled."

INDIANA:

Indianapolis vs. Emberry (1861), 17 Ind., 175; *Palmer vs. Stumph* (1868), 29 Ind., 329; *Adams vs. Shelbyville* (1900), 57 N. E. Rep., 114.

The case last cited involved the validity of the Barrett law which authorized assessments for street improvements to be made against the lots abutting upon the improvement according to the frontage of the several lots. It was decided since the Norwood case. We quote from the opinion:

> "In 1852 the right to confer authority upon municipal officers, and so provide for street and other improvements, was first asserted by the legislature in a general law. * * * The right to enforce such assessments was recognized by this court in 1861 (*Indianapolis vs. Emberry*, 17 Ind., 175) and in many subsequent decisions.

> The constitutionality of such legislation was never called in question till 1868, when it was assailed on the ground that the same was in violation of the State Constitution requiring the rate of assessment and taxation to be uniform and equal. Such legislation was then and subsequently upheld against that objection."

The assessment made according to the frontage was sustained.

IOWA:

Amery vs. Keokuk, (1876) 72 Ia., 701; *Gilchrist vs. McCartney*, (1896) 97 Ia., 138; *Allen vs. Davenport*, (1898) 107 Ia., 103.

In *Amery vs. Keokuk* it is said:

> "The property abutts upon the street where the improvement was made, and is subject to a tax in some amount. *Warren vs. Henly*, 31 Ia., 31. There can be no escape from this conclusion. All that the plaintiff can claim is an opportunity to be heard as to the amount of the tax. Now, if the mere measurement of the front of the lots abutting upon the improved street, and the mathematical calculation of the plaintiff's portion of the tax, required that notice be given to the plaintiff of the proceedings in the matter of the assessment and levy, all that such notice could avail would be to prevent or correct mistakes in the amount chargeable to plaintiff's property. We do not think that a notice to the owner, in a case like this, should be held to be essential to the validity of the assessment and levy. It appears to have been quite uniformly held that where the only act necessary to ascertain the amount of the assessment upon the property is a plain, mathematical calculation, and no discretion is left to the city council, no notice is necessary."

In *Allen vs. Davenport* it is said:

> "The front foot rule of assessment is challenged, and it is also said that, as the assessments are not limited to the benefits conferred, the tax is unconstitutional. We have heretofore approved of what is known as the 'front foot rule of assessment,' and have also said that the expense of improving streets has been too long imposed upon abutting property without regard to benefits to be now called into question."

KANSAS:

Burnes vs. Atchison (1864), 2 Kan., 455. The opinion in the case by KINGMAN, J., declares:

> "The granting of municipal powers, including powers of local taxation for the improvement of streets and other purposes,

to cities and villages is an ordinary act of legislation in immemorial use and probably exercised by every state and territory in the Union, and no court that we are aware of has ever pronounced such legislation void.

Whether a legislature could authorize a municipal corporation to assess property for street improvements, not according to the value but according to the supposed benefit to accrue from the improvement to the property taxed, has sometimes been questioned, though generally, if not uniformly, such legislation has been sustained."

In *Parker vs. Challis* (1872), 9 Kan., 155, an assessment to pay for a sidewalk against the lots fronting on the work according to the front feet thereof was sustained in an opinion by Brewer, J.

In *Blair vs. Atchison* (1888), 40 Kan., 353, a levy on lots to the center of the block on either side of an improved street to pay for the paving thereof according to the assessed value of each lot was sustained.

Atchison vs. Peterson (1897), 5 Kan. App., 103. In the opinion by Mahan, P. J., the following language is used:

> "When the legislature, by the direct exercise of its authority (or the exercise of its authority through a board of commissioners or assessors appointed by the legislature or under its authority), apportion the benefits and levy the expenses, it is an exercise of legislative authority and will not be interfered with by the courts.
>
> * * *
>
> So it follows that it is not a presumption upon which a court declares benefits or no benefits, but a legislative determination, the exercise of its prerogative pertaining to the taxing power, because these levies by special assessments pertain to the taxing powers as much as do the collection of general revenues."

Kentucky:

Lexington vs. McQuillon Heirs (1839), 9 Dana, 513; *Broadway Baptist Church vs. McAtee* (1871), 8 Bush, 508; *Nevin vs. Roach* (1887), 86 Ky., 492.

The opinion in the case last cited is by Chief Justice Pryor, in which it is said:

"All such assessments are made upon the idea that the property subject to such assessment is benefited by reason of the charge upon it. But to require the city or the contractor in each to show the immediate advantages resulting to the owner from the construction and improvement of streets in the way of pecuniary benefits would be to prohibit, in effect, such improvements by means of local burdens. As said by the special chancellor below, the land may be benefited in many ways not easily determined upon the basis of money value. Such improvements make the land more desirable to purchasers and create conveniences that the owner not otherwise has.

This method of assessment has been so long followed by the city government and approved by this court that it no longer remains an open question. The same may be said of the question of notice to the taxpayer that he may appear and show why he should not pay his proportion of the cost of the improvement."

In *Dumesnil et al. vs. Gleason* (1896), 99 Ky., 652, the court say:

"The original construction of public ways shall be made at the cost of the owners of lots in each fourth of a square binding upon or contiguous to the improvement, to be equally apportioned according to the number of square feet owned by them respectively, with an exception with reference to corner lots. This court has never undertaken to change this rule, nor can it be done except by legislative power."

Since Norwood case, *City of Augusta vs. McKibben* (1901), Ky., 60 S. W. Rep., 291, adheres to the front foot rule.

LOUISIANA:

Shelby vs. Commissioners (1859), 14 La. An., 437; *Barber A. P. Co. vs. Gogreve* (1889), 41 La. An., 251; *Barber A. P. Co. vs. Watt* (1899), La. An., 26 S. Rep., 70; *Kelley vs. Chadwick* (1901), La. Sup. Ct., not yet reported.

The law under consideration in the last case cited provided, in respect to paying for street pavements, that,

"two-thirds of said * * * paving * * * shall be borne equally by the owners of real property abutting upon either of said roadways; and one-third of the cost shall be paid by the City of New Orleans."

The court, after reviewing the Norwood case, say:

> "It is our decided conviction that the statute and special assessment involved in this discussion are constitutional and legal."

MASSACHUSETTS:

Dower vs. City of Boston (1851), 7 Cush., 277; *Wright vs. City of Boston* (1852), 9 Cush., 241. The opinions in both of these cases were rendered by Chief Justice SHAW, and in both, the method of appropriating the cost of constructing sewers under the ordinances of Boston was sustained. The method there adopted, as stated in the opinion in the last cited case, is as follows:

> "The general expenses of making any drain are to be ascertained and reported to the board, and after a deduction of not less than one-fourth of the whole expenses the balance is to be assessed according to their value, independently of any buildings upon them upon the estates benefited, and charged to the owners thereof."

The learned judge, in sustaining this assessment, and in answering the objections urged against the assessment by reason of the fact that some lots were vacant and their owners did not use the sewer, and that the surface of some lots was below the grade of the sewer, observes:

> "The potentiality of receiving a benefit from the sewer was the thing to be charged with the tax. This added a value to the land *in praesenti* either for the purpose of sale or improvement."

Springfield vs. Gay (1866), 12 Allen, 612. In this case it is said:

> "The statute does not require that the assessment imposed on estates to defray the expense of building sewers should be assessed according to the benefits which each estate might receive from their construction. We can readily see that it would be difficult, if not impracticable, to make an assessment which would operate fairly and equally, based on an assessment of the benefits which each estate might derive from the construction of the sewer. These benefits would necessarily be conjectural and difficult of assessment."

In *Kingman vs. Met. Sewerage Coms.* (1891), 153 Mass., 566, it is said:

"The case of *Dargen vs. Boston* arose under an act providing that the expense of widening a street shall be assessed upon abutting estates in proportion to their value. The whole principle of assessing the cost of local improvements upon abutters was attacked in the argument. This court, in the course of the elaborate judgment sustaining the validity of the tax, said: .

'Nor can it be contended that the Constitution (State) in regard to this species of taxation, furnishes any fixed rules of proportioning, or gives any absolute standard by which to determine whether the property taxed is within the limits of the legitimate exercise of the power granted. Undoubtedly a very wide discretion was intended to be left to the legislature as to the subjects and methods of executing the authority conferred on them of imposing taxes for purposes other than those of a general nature, and yet the power is not wholly without limit.' "

In *Sears vs. Board of Aldermen* (1899), 173 Mass. 71, the validity of an assessment of the cost of sprinkling a street levied against the estates abutting on the street "in proportion to the number of lineal feet of real estate upon the street or part thereof so watered" was considered and upheld in the light shed upon the principles underlying property rights by the opinion in *Norwood vs. Baker*. The Supreme Court of Massachusetts in this opinion say:

"The case of the *Norwood vs. Baker*, 172 U. S., 269, contains an elaborate discussion of this subject, with a citation of authorities from many of the states, and holds that a local assessment for an amount in substantial excess of the benefit received is in violation of the Fourteenth Amendment to the Constitution of the United States, in as much as it would deprive one of his property without compensation, and so without due process of law. * * *

While these assessments must be founded upon benefits, the courts have generally recognized the difficulty, and in many cases the impracticability, of attempting to estimate benefits to estates, one by one, without some rule or principle of general application which will make the assessements reasonable and proportional according to the benefits. Accordingly, the determination of such a rule or principle by the legislature itself, or by the tribunal appointed by the legislature to make the assessments, has commonly been upheld by the courts. * * * Assessments of special taxes by an estimate of the particular benefits to each lot according to measurement of the amount of frontage upon a street or sewer, according to the measurment of the area of the lots, and according to the valuation of the property, have all been sustained. * * *

Perfect equality in the distribution of public burdens is not attainable. We are, therefore, of the opinion that in its application to the facts of the present case the statute is constutional."

MICHIGAN:

Williams vs. Detroit (1853), 2 Mich., 560; *Motz vs. Detroit* (1869), 18 Mich., 522; *Thomas vs. Gain* (1876), 35 Mich., 155; *Sheley vs. Detroit* (1881), 45 Mich., 431.

In *Motz vs. Detroit*, COOLEY, J., says:

"By this decision (referring to *Williams vs. Detroit*, 2 Mich., 560) it will be perceived the constitutionality of assessments for local improvements upon property more immediately benefited, and by a ratio of frontage instead of one of value, was fully affirmed; and this was accepted as the settled law of the state and acted upon in very many instances thereafter. * * *

In two successive cases, therefore—the last disposed of after there had been an entire change in its members, with a single exception—it has been decided by this court that local assessments for local improvements without regard to valuation are admissible under the Constitution. A due respect to our predecessors, I think, and to uniformity and stability in judicial action, demand that we recognize this point as no longer open to controversy."

In *Thomas vs. Gain* (1876), 35 Mich., 155, it is said:

"The idea that underlies statutes for this purpose is that the benefit to abutting property is generally in proportion to the length of their respective fronts, and that as a rule this principle of apportionment is more just than any other. There is a basis of truth to this idea, and it is so generally accepted that assessments for street improvements are perhaps now more generally apportioned by the frontage than by any other standard." This language was approved in *State vs. Robt. T. Lewis Co.* (1898), 72 Minn., 87.

In *Sheley vs. City of Detroit* (1881), 45 Mich., 431, COOLEY, J., for the court, says:

"We might fill pages with the names of cases decided in other states which have sustained assessments for improving streets, though the apportionment of the cost was made on the same basis (according to frontage) as the one before us. If anything can be regarded as settled in municipal law in this country, the power of the legislature to permit such assessments, and to direct an apportionment of the cost by frontage, should by this time be considered as no longer open to controversy. Writers on constitutional law, on municipal law, and on the law of taxation, have collected the cases, and have recognized the principle as settled; and, if the question were new in this state we might think it important to refer to what they say. But the question is not new. It was settled for us thirty years ago."

Kalamazoo vs. Francoise (1898), 115 Mich., 554: A resolution of the city council that the sum of three dollars and twenty cents be assessed on each lineal foot frontage on all lands abutting on either side of East Main street between certain points, said sum being one-third of the estimated cost per lineal foot of the improvement, to pay for the work of paving a street, was approved, and the court say:

> "This was in accordance with the discretion confided to the council. The question of the right to pave certain streets, and assess according to street frontage, we must treat as settled by our own decisions."

Since the Norwood case, *Cass Farm Co. vs. City of Detroit* (1900), 83 N. W. Rep., 108.

MINNESOTA:

The doctrine in this state was first declared to be that special as well as general taxes should be levied according to valuation.

In 1869 this rule was changed by constitutional enactment in the following words:

> "The legislature may by general law or special act authorize municipal corporations to levy assessments for local improvements upon property fronting upon such improvements, or upon property benefited by such improvements, without regard to a cash valuation, and in such manner as the legislature may prescribe." Const. Minn., Art. 9, Sec. 1.

Since that date the front foot rule has been uniformly sustained. For sprinkling tax (1888), *State vs. Reese*, 38 Minn., 371. For water mains, *State vs. Robt. P. Lewis Co.* (1898), 72 Minn., 87.

In the case last cited it is said:

"The Constitution expressly provides that the frontage tax or assessment may be made on all lands fronting upon such mains or pipes as may be laid by cities or other municipalities, and without regard to the cash value of such lands. And this is what was directed to be done by the statute under which these proceedings were had, nothing more. The statute is not open to the objection made."

MISSISSIPPI:

Smith vs. Aberdeen (1853), 25 Miss., 458; *Williams vs. Comack* (1854), 27 Miss., 209.

In the case last cited a levy assessment according to area was upheld, and the court observe:

"Nor is it any objection to the constitutionality of the act that it operates injuriously upon the appellant. Every revenue bill and every work of public improvement must more or less have such an effect. But they must be submitted to as the necessary action of the machinery of government, and as individual sacrifices to the general good in order that the advantages of the social compact may be enjoyed."

MISSOURI:

In *Egyptian Levee Co. vs. Hardin* (1859), 27 Mo., 495, an assessment per acre to pay cost of a levee was sustained.

In *St. Joseph vs. Anthony* (1860), 30 Mo., 537, the front foot rule of assessing cost of street pavement was upheld. So also in *Rutherford vs. Hamilton* (1888), 97 Mo., 543, and *Moberly vs. Hogan* (1895), 131 Mo., 19; *Springfield vs. Weaver* (1896), 137 Mo., 650.

In *Rutherford vs. Hamilton* it is said:

"It is also argued that the act is unconstitutional because the cost of the sewer was apportioned by the city engineer against the property fronting on the improvement, in proportion to the frontage of each lot, without considering the amount of actual benefits conferred by the sewer on each lot owner. Section 3 of the Act of 1881, already mentioned, expressly authorized such method of apportioning the cost of the local improvement here considered. It is no longer an open question in this state whether that method is constitutionally applicable to such subjects.

Special taxes for local improvements of this nature may be properly imposed by authority of the taxing power of the state upon the property specially benefited thereby. In many well considered cases it has been held that such charge may, by valid laws or authorized ordinances, be levied upon the abutting property having the benefit of the improvement, in proportion to its frontage thereon, as well as by other approved methods for such apportionment. Here the legislature saw fit to apply the 'front-foot rule.' No sufficient reason has been advanced to warrant the conclusion that its application is unconstitutional in view of the previous ruling of this court."

The proposition before the court in *Moberly vs. Hogan*, and its ruling, are stated in the opinion in these words:

"The amount of the judgment is small, but the case is brought here for the alleged reason that the effect of the proceeding is to deprive defendant of his property without due process of law, as forbidden by the Federal Constitution, and to take it for public use without just compensation, in violation of his rights under the State Constitution. * * *

The constitutional objections to the tax-bill are groundless in view of a number of decisions extending through many years of the history of this court. It is established law that tax-bills of the sort in question are sustainable as an exertion of the taxing power. *Garrett vs. St. Louis* (1857), 25 Mo., 505; *Palmyra vs. Morton* (1857), 25 Mo., 593; *Farrar vs. St. Louis* (1883), 80 Mo., 379; *St. Joseph to use vs. Owen* (1892), 110 Mo., 445, 19 S. W. Rep., 713. The authority invested with the power of taxation for such purposes determines the occasion for the tax and levies it upon the property subject to the tax. Where this is regularly done, in accordance with the terms of the law conferring the power, the propriety of the tax in the particular instance is not a judicial question, and it is not reviewable by the courts in the manner here attempted. *McCormick vs. Patchin* (1873), 53 Mo., 33; *Seibert vs. Tiffany* (1879), 8 Mo. App., 33; *Estes vs. Owen* (1886), 90 Mo., 113; *St. Louis vs. Ranken*, (1888) 96 Mo., 497."

Objections to the constitutionality of this method of assessment as being an attempt to take property without due process of law and as charging land without according the property owner a hearing, have been again and again considered and overruled by the Supreme Court of Missouri.

The opinion of GANTT, P. J., in *Saxton Nat. Bank vs. Carswell* (1894), 126 Mo., 436, reviews the cases and concludes:

"We think it will not be seriously questioned that it was entirely competent for the legislature to create the tax district, that is to say, it had the power to impose on the abutting property owners the burden of the grading of the street, and this it has done by the charter, and it was competent for the legislature to empower the city to make the contract for grading. No notice was required to be given defendants of the passage of the ordinance or letting the contract. All that was left, then, which could affect defendant's rights, was the assessment of the land on both sides of the street and an apportionment of the cost to her lot of her share. Before her lot could be taken or sold, the statute required she should be sued in a court of competent jurisdiction, and all the defendants were duly notified as provided by law.

When the statute is carefully considered it will be observed that it nowhere denies the property owner any defense that is available to any other defendant in a court of general jurisdiction, but as if to anticipate the claim that he was precluded from denying the correctness of the action of the assessor or engineer, it is expressly provided that in such action he may 'plead in reduction of the bill any mistake or error in the amount thereof or that the work was not done in good and workmanlike manner.'

There is then afforded him every guarantee of the Constitution."

This ruling was adhered to by all the judges present at court *in banc* in a street paving case, *Springfield vs. Weaver* (1896), 137 Mo., 650. The same question was determined with the same result with respect to sidewalks in *City of Kansas vs. Huling* (1885), 87 Mo., 203.

MARSHALL, J., speaking for the court in *Morrison vs. Morey* (1898), 146 Mo., 563, says:

"The power to construct drains and sewers, to open and improve streets, to regulate the uses of private property so as to prevent nuisances, * * * is all dependent upon the police power of the state, exercised for the benefit of the health and well-being of the people. In every case there must be the impress of a public purpose upon the law to make it constitutional. It is not enough that private interests will be subserved, or that private property will be enhanced in value. There must be a public interest applicable to a community of persons to be benefitted."

Since the decision of *Norwood vs. Baker*, the Supreme Court of this state has had occassion to review the principles now in discussion, and has distinguished the issues involved in the assessment of the cost of street pavements according to the front foot rule, and sewers according to the area rule, from that controlling the decision in the Norwood case, in the following cases: *Heman vs. Allen* (1900), 156 Mo., 534; *Barber Asphalt Paving Co. vs. French* (1900), 58 S. W. Rep., 924; *Hill vs. Swingley* (1900), 60 S. W. Rep., 114. Chief Justice GANTT for the court *in banc* in *Barber Asphalt Paving Co. vs. French*, says:

> "We think that *Norwood vs. Baker*, must be read with a view to the particular facts in judgment in that case, and that it was not the intention of the Supreme Court of the United States to overturn the long line of its own decisions which are in harmony with so many of the decisions of the courts of last resort in the several states of the Union, and upon the faith of which vast property rights have accrued.
>
> Indeed, as we understand the opinion, the court expressly declined to shake the authority of *Parsons vs. The Disirict of Columbia*, 170 U. S., 45, in which that court sustained an assessment per front foot upon property abutting upon a street improvement. In that opinion each of the justices who concurred in the majority opinion in *Norwood vs. Baker*, concurred. * * *
>
> It is, however, insisted that the Norwood-Baker case condemns this front foot rule because it affords no opportunity for a hearing. Still, conceding as we do, that there are expressions to this effect in that opinion, it seems so clear to us, that the opinion was not predicated upon the want of notice and that no amount of notice could have availed to secure justice to Mrs. Baker under the scheme devised, that we do not believe the Supreme Court intended to lay down as law that a state statute imposing taxes must necessarily and in all cases provide for notice and a hearing to the taxpayer before it can be held valid.
>
> We think the decisions of that court are overwhelmingly to the contrary, and we discern no purpose in this opinion to overrule and set aside all of its prior utterances on this subject. * * *
>
> We are of opinion that the Supreme Court of the United States will not condemn the assessment in the case at bar because it falls clearly within the doctrine of the Parsons case and the construction placed on that case in the Norwood case, and because no

court has more emphatically determined that an assessment by the front foot rule is an exercise of the taxing power, and is a legislative function with which the courts have no power to interfere and will not do so."

NEW YORK:

People vs. Brooklyn (1851), 4 Comstock, (N. Y.) 419; *Spencer vs. Merchant* (1885), 100 N. Y., 585; *McLaughlin vs. Miller* (1891), 124 N. Y., 150.

In *The People vs. Brooklyn* (1851), 4 Comstock, N. Y., 419, opinion by RUGGLES, J., it is said:

"It has been said that the benefits derived from the grading and paving of a street are sometimes fanciful and imaginary and always uncertain and incapable of being estimated with that exactness which is necessary for the purpose of justice to the individuals assessed. But this is a consideration to be addressed to the legislature and not to the judicial authorities. The courts cannot assume that this proposition is true in point of fact. The legislature has evidently acted on the belief that it is untrue. That mistakes may happen, that abuses may have been practiced and that injustice may have been done in making street assessments, it is not necessary to deny. Mistakes, abuses and injustice have often occurred in general taxation. These are not grounds on which either system of supplying the public treasury can be denounced as unconstitutional. If the systems are imperfect they should be reformed by the legislature. If street assessments are in their practical operation, oppressive and unjust, the statutes which authorize them should be repealed. The remedy for unjust or unwise legislation is not to be administered by the courts. It remains in the hands of the people, and is to be wrought out by means of a change in the representative body, for it cannot be otherwise obtained. The Constitution has imposed upon the legislature the duty of restraining the power of municipal corporations in making assessments, and of preventing abuses therein. (Article 8, Section 9). To assume that this duty has been and will be neglected is a denial of that reasonable confidence which one department of the government ought always to entertain towards the others."

In *Spencer vs. Merchant*, it is said:

"The Act of 1881 determines absolutely and conclusively the amount of the tax to be raised, and the property to be assessed and upon which it is to be apportioned. Each of these things was within the power of the legislature, whose action cannot be re-

> viewed in the courts upon the ground that it acted unjustly or without appropriate and adequate reasons. * * * By the Act of 1881 the legislature imposes the unpaid portion of the cost and expense, with the interest thereon, upon that portion of the property benefited which has thus far borne none of the burden. In so doing it necessarily determines two things, viz., the amount to be realized and the property specially benefited by the expenditure of that amount. The lands might have been benefited by the improvement, and so the legislative determination that they were, and to what amount or proportion of the cost, even if it may have been mistakenly unjust, is not open to our review. The question of special benefit, and the property to which it extends, is of necessity a question of fact; and when the legislature determines it in a case within its general power, its decision must, of course, be final."

In *McLaughlin vs. Miller*, it is said:

> "The legislative power is ample to provide for a public improvement, and for that purpose to designate the district deemed benefited by it with the municipalities where it is to be improved, and charge the expense of it upon the property in such districts, and direct assessments to be made for it there." (Citing *In re Van Antwerp*, 56 N. Y., 561; *Spencer vs. Merchant*, 100 N. Y., 585).

Since Norwood case, *Conde vs. City of Schenectdy* (1900), 58 N. E. Rep., 130. In which the Court of Appeals of N. Y. distinguish a street pavement assessment made according to the front foot rule from the assessment involved in the Norwood case and upheld it. The court, by CULLEN J., say:

> "Even where no provision is made by law for the apportionment of the expense according to the frontage of the land abutting on the street, the equity of the principle is so apparent that the rule has been almost universally adopted through the municipalities of this state."

NORTH CAROLINA:

In *City of Raleigh vs. Peace* (1892), 110 N. C., 32, it is held, after a full consideration of the authorities, that the front foot rule of assessing the cost of street improvements is constitutional. It is said:

"The authority of the legislature, either directly or through its local instrumentalities, to exercise the taxing power in the form of local or special assessments, has been so firmly established by judicial decision in this and other States of the Union that it can hardly, at this late day, be considered an open question; but, as it seems to be controverted by the argument of counsel, it may not be improper to state in a general way, the principle upon which it is founded, as well as to refer to some of the multitude of authorities in its support."

And it is concluded that:

"The power to collect the assessments being expressly granted, and the manner of collection prescribed, it must follow that, in the total absence of anything to show an abuse of power or any gross inequalities, the assessment in question may be enforced."

NORTH DAKOTA:

Ralph vs. City of Fargo (1898), 7 N. Dak., 640; *Roberts vs. First National Bank* (1899), 76 N. W., 1050.

The opinion of CORLISS, C. J., in *Ralph vs City of Fargo*, is vigorous and exhaustive in its comprehension and statement of the principles and discussion of the authorities bearing upon this issue. The statute required the expense of paving a city street to be assessed against abutting property in proportion to frontage. In the opinion it is said:

"That there is a line of decisions which more or less supports the plaintiff's theory in this action cannot be doubted. They illustrate a tendency of the judicial branch of the government to usurp power for the purpose of preventing injustice or hardship in individual cases. Such a course is indefensible. If the courts are to interfere whenever inequality in taxation is discerned, civil government must cease. * * *

If, in cases of local assessments, the front foot rule is to be applied, all in the same class must be treated alike. These are limitations in the exercise of the taxing power which inhere in the very nature of the power itself. When the legislature oversteps these boundaries, it is not exercising the taxing power at all, but is guilty of an attempt, arbitrarily, to confiscate the property of the citizen. But, when these limitations have not been violated, then the courts must look solely to the Constitution for their authority in annulling a statute passed in the exercise of the taxing power, whether such statute relates to a general tax or a local assessment. It is true that the legislature cannot by its fiat make such a local improvement which is not such an improvement in its essential nature. But when it is once ascertained that the improvement is local in character, and that the property in the special taxing district may, in a general sense be said to be peculiarly benefited thereby, it is for the legislature to determine how much of the expense of the improvement shall be collected from that district, and where the boundaries of that district shall be drawn, or it may delegate to a board or a public functionary, the power to prescribe the extent of such district. We cannot discover any foundation for those decisions which seem to hold that a local improvement may at the same time, as to a portion of the expense thereof, be not a local, but a general, improvement. A local improvement is an entirety, and therefore cannot be divided. What portion of the expense shall be borne by the special district, and whether all of it shall be collected therein, is a matter of legislative discretion. * * *

How could the courts ever determine what part should be paid out of the general treasury and what part raised by local assessment? What rule would govern them in investigating such a question? And what right have they to dictate where the line shall be drawn? * * *

Much of the fear of disastrous consequences to the taxpayer from an abuse of the power of local assessment is fanciful. Legislators are not destitute of a sense of justice. They are controlled by an intelligent and active public opinion. The laws they enact affect their own constituents. The governing body of the city is always intrusted with the power to decide whether the local improvement shall be undertaken; and usually (such being the case under the statutes of this state) the majority of the property owners who will be assessed for the work, can veto the resolution of the city council directing it to be done. While cases of individual hardship will occur, and this must be expected in the working of any tax system which can ever be devised, yet it is hardly conceivable that any scheme of local assessment will ever be formulated, that in its whole scope will be oppressive and unjust. * * *

Our conclusion is that the statute is valid, and we therefore reverse the judgment of the district court, which is founded upon the contrary view of the law. All concur."

Since the Norwood case in *Webster vs. City of Fargo* (1900), 82 N. W. Rep., 732, that court distinguishes an assessment for street pavements from the facts of the Norwood case and sustains it; BARTHOLOMEW, C. J., speaking for the court, says:

> "The fact of special benefit to the special district being thus established (by the legislative action), no taxpayer in that district can be heard to say that he is not benefited, or that he is not benefited as largely as any other taxpayer in the special taxing district having the same valuation, area or frontage, as the case may be. No reason can be assigned why the taxpayer in the special district should have any more right to raise that question than the taxpayer in the permanent district. It never can be correct to say that special assessments must be measured by special benefits, and can never exceed them. That is true in theory, but only in theory. In practice it cannot be enforced. The moment we concede that any one taxpayer has the right to the judgment upon the question of his benefits of any tribunal except the legislature or the body authorized by the legislature to decide the matter, that moment we defeat the power of the legislature to make or authorize special assessments."

OHIO:

Ernst vs. Conklin (1856), 5 Ohio St., 520:

The facts: In 1854 the city council of Cincinnati, having contracted to pave and macadamize Harrison road, made an assessment of three dollars and fifty-eight cents and four-tenths mills on each front foot of the land abutting on that part of the road where the work was done, and directed the owners to pay the same. This was a suit to enforce the assessment. The assessment was sustained.

Railroad Co. vs. Connelly (1859), 10 Oh. St., 159.

The City of Toledo was organized under an act to provide for the organization of cities and incorporated villages, passed May 3rd, 1852. That city made an assessment to pay the expense of grading a street within its limits upon lots and lands abutting thereon in proportion to the feet fronting on said street. The court say:

> "Section 116 of the Act to provide for the organization of cities, etc., authorizes the assessment to be made in either mode (in proportion to the feet front or upon the value of the land),

> and these cases established that an assessment in proportion to the feet front is not unconstitutional. The law purposely leaves the city authorities free to adopt whichever mode they, under the circumstances, may deem most equitable, and in some cases certainly the ratio per front foot would approximate more nearly to the benefits received than a uniform percentage upon the previously assessed valuation."

Upington vs. Oviatt (1873), 24 Oh. St., 232; *Wilder vs. Cincinnati* (1875), 26 Oh. St., 284; *Haviland vs. City of Columbus* (1893), 50 Oh. St., 471.

In the opinion rendered in the last cited case by MARSHALL, J., it is said:

> "Here the principle of the rule adopted is, that an improvement upon a certain street benefits the property on it in proportion to the frontage of each lot. While this method may not be as equal in theory as that by a valuation, or as that of an apportionment according to benefits, in practice it is found to be more equitable than either, because of the difficulty of applying the principle of the other methods so as to attain equality."

Schroder vs. Overman (1899), 61 Oh. St., 1, was an action to restrain the assessment of the cost of as treet improvement against abutting property according to the front foot rule. This rule is authorized by the laws of Ohio. The trial court found the benefit resulting to the property charged exceeded the costs of the work. SPEAR, J., for the court says:

> "We are dealing with a case where the court has determined, upon a trial, that the benefit in fact exceeds the amount of assessment, and yet where the plaintiff asks the interposition of a court of equity to prevent the commission of an alleged wrong upon her property. We are of the opinion that the *Norwood* case does not control the case at bar, and that the relief prayed for should not be granted simply because the proceedings of the council do not show affirmatively that the assessment was assessed according to the benefits, nor that the subject of benefits was not, by that body, taken into consideration."

The assessment was sustained.

OREGON:

King vs. Portland (1865), 2 Or., 146; *Wilson vs. Salem* (1893), 24 Or., 504.

In the last cited case it is held that,

> "Under a city charter making each lot or part, liable in whole or in part, as the council may determine, for the cost of an improvement on the half street in front thereof, and providing that the council may assess on each lot or part thereof, liable therefor, its proportionate share of said cost, it is proper to make an assessment by the front foot."

Since the Norwood case the subject of this discussion has been exhaustively considered with great discrimination and sound judgment by the Supreme Court of Oregon in an opinion worthy of the highest court of any State of the Union. In the unanimous opinion of that court by WOLVERTON, J., the rule contested for is sustained and the conclusions of the court are stated in *King vs. Portland* (Dec., 1900), 63 Pac. Rep., 8.

> "The Norwood case would seem, at first thought, to forbid the application, under all conditions, of the front foot rule, but it was probably not intended that it should be so far-reaching in its significance. As applied to that case, and all similar cases, it must be accepted as controlling. The rule has been many times upheld, and it is believed it yet may be, where the conditions are such that it may reasonably be supposed that the method adopted will secure a proportional distribution of the burden according to the benefits. * * *
>
> "But we are inclined to believe that the better doctrine deducible from adjudged cases, including those of the Supreme Court of the United States, is that the assessment will be upheld wherever it is not patent and obvious from the nature and location of the property involved, the district prescribed, the condition and character of the improvement, the cost and relative value of the property to the assessment, that the plan or method adopted has resulted in imposing a burden in substantial excess of the benefits, or disproportionate within the district as between owners. This must be so, logically and necessarily, in view of the broad latitude acccorded the legislature, in its discretion, to prescribe the taxing district, and the manner and method of making the assessment within the district, as it concerns individual owners and proprietors. As the writers say, the authority of the legislature in these respects is almost without limit; yet that there is a limit beyond

which it cannot go, all will concede. When, however, it has exercised its legislative discretion and prescribed a district and adopted a method, it ought to be plain and indisputable that it has exceeded its constitutional authority before the court should undertake to set at naught, its declared will. Neither ought the system to be condemned because there may be exceptions wherein it would work a legal injury to enforce it."

PENNSYLVANIA:

Hammett vs. Phila. (1870), 65 Pa. St., 146; *Michener vs. Phila.* (1888), 118 Pa. St., 535; *Harrisburg vs. McCormick* (1889), 129 Pa. St., 213; *McKeesport vs. Busch* (1895), 166 Pa. St., 46; *Whitman vs. City of Reading* (1895), 169 Pa. St., 375.

In *Hammett vs. Philadelphia*, the opinion was rendered by Judge SHARSWOOD, in which it is said:

"The original paving of a street brings the property bounding upon it into the market as building lots. Before that it is a road, not a street. It is therefore a local improvement with benefits almost exclusively peculiar to the adjoining properties. Such a case is clearly within the principle of assessing costs on the lots lying upon it. Perhaps no fairer rule can be adopted than the proportion of feet front, although there must be some inequalities if lots differ in situation and depth."

In *Whitman vs. City of Reading* the court uses this language:

"While the front foot rule of assessment does not express a principle of taxation, but merely a convenient method, yet its foundation is not in uniformity of value, but uniformity of benefit. Properties in the same general situation are presumed to get the same general benefit from the common improvement, and, as this benefit is assessed exclusively on property abutting on the line of the improvement, it is presumed to be fairly measured by the foot frontage of the property. * * *

Whatever doubt may have been originally entertained of it as a substitute, which it really is, for actual assessment by jurors or assessors under oath, it has been so often sanctioned by decisions it would ill become us now to unsettle its foundation by disputing its principle."

Since the Norwood case the Superoir Court of Penn-

34010

sylvania have sustained the front foot rule in the case of *Harrisburg vs. McPherran* (1900), not yet reported, opinion by Rice, P. J., in which, referring to the Norwood case, it is said:

> "On a hasty reading it might seem that the court meant that the front foot rule, whenever and wherever applied, is necessarily a rule or mode of assessment which excludes from consideration, special benefits to the properties assessed. We do not so interpret the decision. On the contrary, we think it is apparent from the opinion, that the thing condemned was the arbitrary assessment of the whole cost of an improvement upon abutting properties, whether such properties are specially benefited or not, to the extent of the cost, and without regard to that consideration."

Rhode Island:

In *Cleveland vs. Tripp* (1880), 13 R. I., 50, a sewer assessment of sixty cents per front foot under the following statute was sustained:

> "All such assessments shall be made upon the estates abutting upon that portion of any street or highway in which any sewer has been or may be constructed, under the provisions of said chapters and of this act, at the rate of sixty cents for each front foot of such estates upon such street or highway, and one cent for each square foot of such estates between such street or highway and a line not exceeding one hundred and fifty feet distant from and parallel with the line of such street or highway; provided, however, that where any estate is situated between two streets or highways, the area upon which such assessment of one cent per square foot is made shall not extend to more than one-half the distance between such streets or highways; and provided, also, that where any estate is situated at the corner of two streets or highways, or otherwise so situated as to be assessed for the expense of making a sewer in one of such streets or highways, that portion of such estate assessed for a sewer in one of such streets or highways shall not be liable to be assessed upon its area for the cost of constructing a sewer in the other of such streets or highways, but only for its frontage upon such street."

A question was raised as to the constitutionality of this assessment of sixty cents per front foot under the Fourteenth Amendment. In the opinion by Durfey, C. J., it is said:

> "To entitle us to hold that the statute authorizing these as-

sessments is unconstitutional, we ought to be satisfied, not only that the fairer modes of assessment might be devised, but that the prescribed mode is indefensively unfair; for in a matter of legislative policy it will not do for the court to substitute their own judgment for that of the general assembly, and to convict the general assembly of fatal error simply because they differ from it in opinion. * * *

Even in the case of a hillside sewer, it is not clear that the benefit, even of the lower abutter, will not be equivalent to the burden, if such equivalence, except in some large and general way, as a matter of average, is required. If it were required, an assessment by valuation would often be more indefensible even than an assessment by area and frontage. * * *

We are of the opinion that such assessments are to be regarded as a species of taxation, and that, with a view to them, a city may properly be subdivided into numerous tax districts, each made up of abutting lots or estates, because in that way the burden chiefly falls where the benefit chiefly accrues; and, regarding them in that light, we think it may be enough that a statute authorizing them is intended to be practically fair, and is not in fact oppressive in its operation. We therefore decide that the statute here, as applied in the compact part of the city, is constitutional, or is at least not so clearly unconstitutional that it is our duty to declare it void."

SOUTH DAKOTA:

In *Winona & St. P. R. Co. vs. Watertown* (1890), 1 S. Dak., 46, the legality of the front foot rule of assessing the cost of street improvements is ably supported in an opinion by CORSON, P. J., in which the conclusion of the court is stated in these words:

"We are therefore led to the conclusion that Congress did not intend, in the limitation placed upon the taxing power in the organic act, to include special assessments for local municipal improvements, and that such assessments were left to the control of the legislature, under such restrictions, as to the apportionment of the same, as it may in its judgment impose on the incorporated towns and cities; and that, as the legislature possesses the power to provide for such assessments, it is competent for it to apportion the assessments, per front foot or otherwise, as it may deem proper."

A second attack was made upon the constitutionality of the rule in *Tripp vs. City of Yankton* (1898), 10 S.

34011

Dak., 516, in which the objection was urged that the method deprived the lot owner of his property without due process of law. The court declare:

"After a careful examination of all the questions presented, our conclusion is that the charter of respondent and the ordinances enacted thereunder, and to which our attention has been called, are not unconstitutional for any of the reasons urged, and that the proceedings of the mayor and city council thereunder should be sustained."

VERMONT:

Allen vs Drew (1872), 44 Vt., 174:

Opinion by REDFIELD, J. The legislature had authorized Burlington to "establish rates of annual rents for the supply of water by means of the city waterworks, and apportion * * * to vacant lots as near as may be possible." The council assessed vacant lots at eight cents per front foot abutting on the water pipes. This assessment was sustained. The learned judge for the court says:

"The power of taxation implies apportionment, and when the legislature has exercised the right and made the apportionment, a court should not assume to declare it void unless the invasion of private right was flagrant and its demonstration clear."

VIRGINIA:

Norfork vs. Ellis (1875), 26 Grat., 277; *Davis vs. Lynchburg* (1888), 84 Va., 861.

In the last case the following language is used:

"In the case before us, it appears that the city council of Lynchburg, for the purpose of grading and paving its streets, has adopted the system of assessments by the front foot on lots adjacent to the street to be improved. The same system has been adopted in other towns and cities of the United States, and has been generally recognized by the courts as constitutional and valid. It is sustained by the highest courts in New York, Ohio, Michigan, Wisconsin, Missouri, California, Kansas, Connecticut and Pennsylvania. *Sedg. St. and Const. Law*, 502-505, and cases cited in *Cooley Const. Lim.*, 507; *Railroad Co. vs. City of Lynchhurg*, 81 Va., 473. It must be held to be a settled principle in this state that such assessments made under the authority of the public law are valid and binding, and whatever remedy is to be applied, if any, must come from the law-making power and not from the courts."

WISCONSIN:

Since the decision of *Norwood vs. Baker*, the Supreme Court of Wisconsin, in *Gleason vs. Waukesha county* (1899), 79 N. W. Rep., 249, have upheld the constitutionality of the statute which empowered the city to construct water connections in the street in front of private property and to levy a special assessment against the abutting land to pay the cost of such work done in front of it, notwithstanding the Norwood-Baker case was relied upon to defeat the assessment. In the opinion it is said:

> "There is no need to prolong the discussion. The charter provision under which the taxes complained of were imposed upon the plaintiff's property, contemplates that the cost of laying gas and water service pipes will be balanced by an equivalent benefit to the property fronting on the street. So far as the evidence shows, there was such equivalent in fact, hence, under the most recent holdings as to the constitutional power to make such assessment, the law itself and the tax imposed under it must be sustained so far as any objection thereto is made on constitutional grounds. *Norwood vs. Baker*, 172 U. S., 269."

This conforms to the earlier holding of that court.

Weeks vs. Milwaukee (1860), 10 Wis., 186; *State vs. Portage* (1860), 12 Wis., 627; *Meggett vs. Eau Claire* (1892), 81 Wis., 326.

Since the Norwood case, *Gleason vs. Waukesha County*, (1899) 103 Wis., 225.

VII.

Every specific objection that can be reasonably urged againt the charter method of assessing the cost of street pavements has been considered and refuted in the opinions of the Supreme Court of the United States.

The legislature has the discretion to determine the benefit district.

Mr. Justice MILLER, speaking for the court, in *Davidson vs. New Orleans* (1877), 96 U. S., 97, says:

"So the determination of the taxing district and the manner of the apportionment are all within the legislative power. *Spencer vs. Merchant*, 125 U. S., 345; *Stanley vs. Supervisors*, 121 U. S., 535, 550; *Mobile vs. Kimball*, 102 U. S., 691; *Hagar vs. Reclamation District No. 108*, 111 U. S., 701; *United States vs. Memphis*, 97 U. S., 284; *Laramie county vs. Albany county*, 92 U. S., 307. And whenever the law operates alike on all persons or property, similarly situated, equal protection can not be said to be denied. *Wartz vs. Hoagland*, 114 U. S., 606; *Railroad Company vs. Richmond*, 96 U. S., 521, 529. The remedy for abuse is in the state courts for in the language of Mr. Justice FIELD in *Mobile vs. Kimball*, 'this court is not the harbor in which the people of a city or county can find a refuge from ill-advised, unequal and oppressive state legislation.' "

In *Spencer vs. Merchant*, 125 U. S., 355, Mr. Justice GRAY, for the court, says:

"The legislature, in the exercise of its power of taxation, has the right to direct the whole or part of the expense of a public improvement, such as the laying out, grading or repairing of a street, to be assessed upon the owners of lands benefited thereby, and the determination of the territorial districts which should be taxed for a local improvement is within the province of legislative discretion."

In the opinion of the court by Mr. Justice GRAY in *Bauman vs. Ross* (1897), 167 U. S., 548, it is said:

"But it is for the legislature, and not for the judiciary, to determine whether the expense of a public improvement should be borne by the whole state or by the district or neighborhood immediately benefited. The case, in this respect, comes within the principle upon which this court held that the legislature of Alabama might charge the County of Mobile with the whole cost of an extensive improvement of Mobile harbor; and, speeking by Mr. Justice FIELD, said: 'The objection urged is that it fastens upon one county the expense of an improvement for the benefit of the whole state. Assuming this to be so, it is not an objection which destroys its validity. When any public work is authorized, it rests with the legislature, unless constrained by constitutional provisions, to determine in what manner the means to defray its cost shall be raised. It may apportion the burden ratably among all the counties or other particular subdivisions of the state, or lay the greater share of the who [illegible] pon that county or portion of the state specially and immediately benefited by the expenditures. *Mobile county vs. Kimball*, 102 U. S., 691, 703, 704. * * *

The class of lands to be assessed for the purpose may be either determined by the legislature itself by defining a territorial district, or by other designation; or it may be left by the legislature to the determination of commissioners and be made to consist of such lands, and such only, as the commissioners shall decide to be benefited."

In the opinion of the court by Mr. Justice BREWER in *Williams vs. Eggelston* (1897), 170 U. S., 304, it is said:

"Neither can it be doubted that, if the State Constitution does not prohibit, the legislature, speaking generally, may create a new taxing district, determine what territory shall belong to such district, and what property shall be considered as benefited by a proposed improvement. And in doing so it is not compelled to give notice to the parties resident within the territory, or permit a hearing before itself, one of its committees, or any other tribunal, as to the question whether the property so included within the taxing district is in fact benefited. *Spencer vs. Merchant*, 125 U. S., 345, 356; *Parsons vs. District of Columbia*, 170 U. S., 44.

The opinion of the court by Mr. Justice SHIRAS in *Parsons vs. District of Columbia* (1897), 170 U. S., 45, quotes with approval from the opinion by Judge FINCH in *Spencer vs. Merchant*, 100 N. Y., 585, the following language:

"The Act of 1881 determines absolutely and conclusively, the amount of tax to be raised and the property to be assessed, and upon which it is to be apportioned. Each of these things was within the power of the legislature, whose action cannot be reviewed in the courts upon the ground that it acted unjustly or without appropriate and adequate reasons. * * * The legislature may commit the ascertainment of the sum to be raised and of the benefited district to commissioners, but it is not bound to do so, and may settle both questions for itself; and when it does so its action is necessarily conclusive and beyond review."

It is within the domain of legislative discretion to provide by general law a definite rule of apportioning the benefits to accrue from paving a street to lots in a defined benefit district.

In *Mattingly vs. District of Columbia* (1878), 97 U. S., 692, Mr. Justice STRONG, speaking for the court, says:

> "It may be that the burden laid upon the property of the complainants is erroneous. Special assessments for special road or street improvements very often are oppressive. But that the legislative power may authorize them, and may direct them to be made in proportion to the frontage, area or market value of the adjoining property, at its discretion, is, under the decision, no longer an open question."

In the opinion of the court by Mr. Justice GRAY in *Bauman vs. Ross* (1897), 167 U. S., 548, it is quoted, *Moline Co. vs. Kimball*, 102 U. S., 691:

> "When any public work is authorized, it rests with the legislature, unless constrained by constitutional provisions, to determine in what manner the means to defay its costs shall be raised. It may apportion the burden ratably among all the counties or other particular subdivisions of the state, or lay the greater share of the whole upon that county or portion of the state specially and immediately benefited by the expenditure."

Continuing Mr. Justice GRAY says:

> "The rule of apportionment among the parcels of land benefited also rests within the discretion of the legislature, and may be directed to be in proportion to the position, the frontage, the area or the market value of the lands, or in proportion to the benefits as estimated by commissioners."

In the opinion of the court by Mr. Justice SHIRAS. in *Parsons vs. District of Columbia*, (1897) 170 U. S., 45, it is said:

> "When, by the Act of August 11th, 1894, Congress enacted that thereafter assessments levied for laying water mains in the District of Columbia should be at the rate of one dollar and twenty-five cents per linear front foot against all lots or land abutting upon the street, road or alley in which a water main shall be laid, such Act must be deemed conclusive alike of the question of the necessity of the work and of the benefits as against abutting property. To open such questions for review by the courts, on the petition of any or every property holder, would create endless confusion. * * *
>
> Our conclusion is that it was competent for Congress to create a general system to store water and furnish it to the inhabitants of the district, and to prescribe the amount of the assessment and the method of its collection."

The prevailing opinion in *Village of Norwood vs. Baker*, by Mr. Justice HARLAN, referring to the decision in *Parsons vs. District of Columbia*, quotes approvingly therefrom as follows:

> "The work was done under the authority of an Act of Congress establishing a comprehensive system for the District and regulating the supply of water and the erection and maintenance of reservoirs and water mains. This court decided that 'it was competent for Congress to create a general system to store water and furnish it to the inhabitants of the District, *and to prescribe the amount of the assessment and the method of its collection, and that the plaintiff in error cannot be heard to complain that he was not notified of the creation of such a system or consulted as to the probable cost thereof.* He is presumed to *have notice of these general laws regulating such matters.* The power conferred upon the commissioners was not to make assessments upon abutting properties, nor to give notice to the property owners of such assessments, but to determine the question of the property and necessity of laying water mains and pipes, and of erecting fire plugs and hydrants; and their *bona fide* exercise of such power cannot be reviewed by the courts.'"

In the opinion of the court by Mr. Justice PECKHAM in *Fallbrook Irrigation District vs. Bradley* (1896), 164 U. S., 112, was considered an *ad valorem* assessment upon all lands in the benefit district. The point was specifically made that the assessment was not made in accordance with, or in proportion to, the benefits conferred by the improvement, and the land was included in the benefit district and taxed, which was not benefited by the improvement. It said:

> "It is insistent that the basis of an assessment upon the lands benefited, for the cost of the construction of the works, is not in accordance with and in proportion to the benefits conferred by the improvement, and, therefore, there is a violation of the constitutional amendment referred to, and a taking of the property of the citizen without due process of law.
>
> Although there is a marked distinction between the assessment for a local improvement and the levy of a general tax, yet the former is still the exercise of the same power as the latter, both having their source in the sovereign power of taxation. Whatever objections may be urged to this kind of an assessment as being in violation of the state constitution, yet as the state court has held them to be without force, we follow its judgment in that case, and

> our attention must be directed to the question whether any violation of the federal constitution is shown in such an assessment. Can an *ad valorem* assessment on the land benefited, or in other words, can such an assessment as is provided for in sections 18, 20, 21 and 22 of the act be equally levied in such a case as this? Assume that the only theory of these assessments for local improvement upon which they can stand is that they are imposed on account of the benefits received, and that no land ought, in justice to be assessed for a greater sum than the benefits received by it, yet it is plain that the fact of the amount of benefits is not susceptible of that accurate determination, which appertains to a demonstration in geometry. Some means of arriving at this amount must be used, and the same method may be more or less accurate in different cases involving different facts. Some choice is to be made, and where the fact of some benefit accruing to all the lands has been legally found, can it be that the adoption of an *ad valorem* method of assessing the lands is to be held a violation of the federal constitution? It seems to us clearly not. It is one of those matters of detail in arriving at the proper and fair amount and proportion of the tax that is to be levied on the land with regard to the benefits it has received, which is open to the discretion of the state legislature, and with which this court ought to have nothing to do. The way of arriving at the amount may be in some instances inequitable and unequal, but that is far from rising to the level of a constitutional problem and far from a case of taking property without due process of law. * * *
>
> We do not discover, and our attention has not been called to any case in this court where such an assessment has been held to violate any provisions of the federal constitution. If it does not, this court can grant no relief."

Judge **Brewer**, while on the circuit, in *Gillette vs. Denver* (1884), 21 Fed., 823, expressly upholds the front foot rule in assessing the cost of constructing a sewer.

When the benefits to accrue from a local improvement are to be apportioned according to a fixed rule determined in advance by a legislative act, the property owner is not entitled to notice or hearing at the time that assessment is made or in respect to the amount of that assessment.

In the opinion of the court by Mr. Justice **Field**, in *Hagar vs. Reclamation District No. 108* (1883), 111 U. S., 701, it is said:

"But where the taking of property is in the enforcement of a tax, the proceeding is necessarily less formal, and whether notice to him is at all necessary, may depend upon the character of the tax and the manner in which its amount is determinable. The necessity of revenue for the support of government does not admit of the delay attendant upon proceedings in a court of justice, and they are not required for the enforcement of taxes or assessments. * * *

Of the different kind of taxes which the State may impose, there is a vast number, of which, from their nature, no notice can be given to the taxpayer, nor would notice be of any possible advantage to him, such as poll-taxes, license taxes (not dependent upon the extent of his business) and generally specific taxes on things or persons or occupations. In such cases, the legislature in authorizing the tax fixes its amount and that is the end of the matter. If the tax be not paid the property of the delinquent may be sold and he be thus deprived of his property. Yet there can be no question that the proceeding is due process of law, as there is no inquiry into the weight of evidence or other element of a judicial nature, and nothing could be changed by hearing the taxpayer. No right of his is, therefore, invaded."

In *Spencer vs. Merchant* (1888), 125 U. S., 345, opinion by Mr. Justice GRAY, it is said:

"The legislature has the power to determine by the statute imposing the tax, what lands which might be benefited by the improvement, are in fact benefited; and if it does so, its determination is conclusive upon the owners and the courts, and the owners have no right to be heard upon the question whether their lands are to be benefited or not, but only upon the validity of the assessment and its apportionment among the different parcels of the class which the legislature has conclusively determined to be benefited."

In the opinion of the court by Mr. Justice SHIRAS, in *Parsons vs. District of Columbia* (1898), 170 U. S., 45, it is said:

"The proposition chiefly urged on our consideration is that, in all cases where proceedings are to be had for taking of property, or to impose a burden upon it, the statute itself must provide for notice to the property owner, otherwise it is unconstitutional; and that the statute under which the present proceeding was had did not provide for notice to the owner of the land to be assessed, nor give him an opportunity to be heard. * * *

In *Hagar vs. Reclamation District No. 108*, 111 U. S., 701, the distinction between a tax or assessment imposed by a direct

> exercise of the legislative power, calling for no inquiry into the weight of evidence, nor for anything in the nature of a judicial examination, and a tax or assessment imposed upon property according to its value to be ascertained by assessors upon evidence, was pointed out, and it was held that in the former case no notice to the owner is required, but that in the latter case the officers, in estimating the value, act judicially, and notice and an opportunity to be heard are necessary.
>
> Our conclusion is that it was competent for Congress to create a general system to store water and furnish it to the inhabitants of a district, and to prescribe the amount of the assessment and the method of its collection; and that the plaintiff in error cannot be heard to complain that he was not notified of the creation of such a system or consulted as to the probable cost thereof. He is presumed to have notice of these general laws regulating such matters."

And this language and decision are approved in the prevailing opinion in the Norwood case.

The Kansas City Charter provides that the property owners may plead and prove as a defense to any tax-bill, any mistake or error in the amount of the bill or that the work was not done in accordance with the contract. *Kansas City Charter*, Art. 9, Sec. 18.

And the Missouri decisions hold that the ordinance and contract providing for the work, may be successfully attacked and declared void if the ordinance is unreasonable in that the special benefit to all the lands in the district does not equal the assessment to be levied against those lands. *Corregan vs. Gage* (1878), 68 Mo., 541; *Kansas City vs. Morton* (1893), 117 Mo., 446; *Morse vs. Westport* (1896), 276; *Skinker vs. Heaman*, 148 Mo. 349.

VIII.

The text writers sustain the rule of the Kansas City Charter.

TEXT-WRITERS:

"When not restrained by the Constitution of the particular State, the legislature has a discretion, coextensive with the broad domain of legislative power, in making provisions for ascertaining what property is specially benefited, and how the benefits shall be apportioned. This proposition, as stated, is nowhere denied." *Dillon Mun. Corp.*, 3d Ed., Sec. 762.

"And the many cases which have been decided, fully establish the general proposition that a charter or statute authorizing the municipal authorities to open or establish streets or to make local improvements, and to assess the expense upon the property which, in the opinion of the designated tribunal or officers shall be benefited by the improvement in proportion to the amount of such benefit, or upon the abutters in proportion to benefits or frontage or supeficial contents, is, in the absence of some special constitutional restriction, a valid exercise of the power of taxation. Whether the expense of making such improvement shall be paid out of the general treasury, or be assessed upon the abutting property or other property specially benefited, and if in the latter mode legislatively declared to be benefited, and if in the latter mode, whether the assessment shall be upon all property found to be benefited, or alone upon the abutters, according to frontage, or according to the area of their lots, is, according to the present weight of authority, considered to be a question of legislative expediency, unless there be some special restraining constitutional provision upon the subject." *Dillon Mun. Corp.*, 3d Ed., Sec. 752.

"The legislature possesses plenary power over the subject of taxation, except so far as it is restricted by the Constitution of the State, or by contract entered into by it, the obligation whereof cannot be impaired, and except so far as it is limited by the Constitution of the United States. Except as thus restricted, the power of the legislature as to the mode, form and extent of taxation is unlimited, absolute and uncontrolled, where the subjects to which it applies are within the territorial jurisdiction of the state." *1 Desty. Tax'n.*, Sec. 24.

"The system which leads to the least mischievous and unjust consequences, is that which takes into account the entire line of the way improved and apportions the expense according to the frontage; for it takes into consideration the benefit to each property owner that accrues from the improvement of the entire line of the way, and does not impose upon one lot owner an unjust portion of the burden." *Elliott on Roads and Streets*, p. 369.

"Where the property fronts on the street improved, then it is possible that it may be said, as a matter of law, that it is benefited to the extent of the expense of the improvement, and on this assumption assessments on frontage may be sustained on principle. * * * Courts should look to consequences, and the consequences of leaving assessments to the judgment of different tribunals would probably result in greater inequality than if the rule of apportionment were directly established by an arbitrary legislative decision. * * *

The weight of authority, however, is overwhelmingly in favor of the right of the legislature to determine what property shall be assessed and how the apportionment shall be made. According to the rule generally laid down, no question can be litigated involving the decision of the legislature,. or the local authorities upon whom the power to decide has been conferred, concerning the apportionment of the expense; all that is open to investigation is the mode of procedure and the manner of performing the work." *Elliott on Roads and Streets*, p. 303.

Mr. William D. Guthrie, in his recent work on "The Fourteenth Amendment to the Constitution of the United States," pp. 95-96, says:

"Taxation is the next branch of the subject of due process of law. In the levying and collection of a tax, a more summary method of procedure must necessarily be followed than in ordinary suits between parties; and the character of the proceeding for the enforcement of taxes must depend upon the nature of the tax and the manner in which its amount is determinable. If the tax be assessed according to value, notice to the owner at some stage of the proceeding is necessary, because in estimating the value the taxing officers act judicially, whereas, if the imposition be a capitation or poll-tax, or a license, or occupation tax, or an assessment according to frontage or acreage, no notice is usual or requisite.

The Fourteenth Amendment does not require the state legislature to provide a hearing in respect of local improvements and public works or in respect of the property which shall be deemed benefited thereby. It is within the discretion of the legislative power to grant or withhold such hearing. So, also, the determination of the taxing district and the manner of the apportionment are within the legislative pówer."

Judge COOLEY, as a text-writer, says:

"If the legislature has fixed the district, and laid the tax for the reason that in the opinion of the legislative body such district is benefited, its action must, in general, be deemed to be conclusive. *Cooley Tax'n* 2nd Ed., p. 640.

"It is conceded that the legislative judgment, that a certain district is or will be so far specially benefited by an improvement as to justify a special assessment, is conclusive, and that its determination as to what shall be the basis of the assessment is equally conclusive. To invoke the intervention of a court for relief against the results of its conclusion, is to invoke the judicial authority to give its judgment controlling effect over that of the legislature, in the matter of the apportionment of a tax, which by concession on all sides, is purely a matter of legislation." *Cooley Tax'n*, 2nd Ed., p. 661.

As Chief Justice he says:

> "It is admitted that the legislature may prescribe the rule for the apportionment of benefits, but it is not conceded that its power in this regard is unlimited. The rule must at least be one which it is legally possible may be just and equal as between the parties assessed. If it is not conceivable that the rule prescribed is one which will apportion the burden justly, or with such proximate justice as is usually attainable in tax cases, it must fall to the ground, like any other merely arbitrary action which is supported by no principal." COOLEY, C. J., in *Thomas vs. Gain*, 35 Mich. 155, in which case the front foot rule was enforced.

IX.

Taxation and due process of law.

Before the decision of *Norwood vs. Baker*, this court, in cases involving the exercise of the power of eminent domain, have held that the taking of private property for public use, without making just compensation, is a violation of the restriction against depriving a person of property without due process of law.

The court does not entertain jurisdiction in a case involving the taking of property for public use without compensation because of the prohibition in the Fifth Amendment to that effect, for that amendment has been uniformly held as a restriction on the Federal Government and not upon the States. It is entertained because the rule of law against taking property for public use without compensation, is by construction, held to be included in the restriction contained in the Fourteenth Amendment. And such a construction is given to the Fourteenth Amendment, either because such a prohibition is established as law in the respective State Constitutions, and is therefore a law of the land for the enforcement of which the Federal jurisdiction may be invoked, or because the principle is one of common law. From whatever source the principle came to be included within that constitutional guaranty, the fact is not disputed that it is established in the State Constitutions, and that the identical words whose force and meaning are now under consideration have long been the subject of the interpretation of the state courts, and indeed even stronger words, for the language of our State Constitution is, "private property shall not be taken or *damaged* for public use without just compensation." Mo. Const., Article II, Section 21. The opinions of the state judiciary are, therefore, as to the meaning of those words, entitled to high consideration.

Mr. Justice GRAY, in *Spencer vs. Merchant* (1888), 125 U. S., 345, says:

> "Yet, as the words of the Constitution are alike in this respect, the decisions of the highest court of the state upon the effect of these words are entitled to great weight."

Mr. Justice MATTHEWS, in *Hurtato vs. California* (1884), 110 U. S., 516, discussing the significance of the term, used this language:

> "In the Fourteenth Amendment, by parity of reason, it refers to that law of the land in each state which derives its authority from the inherent and reserved powers of the state, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and the greatest security for which resides in the right of the people to make their own laws and alter them at their pleasure."

Mr. Justice BRADLEY, in *Mo. vs. Lewis* (1880), 101 U. S., 22, for the court, says:

> "The Fourteenth Amendment does not profess to secure to all persons in the United States, the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two states separated only by an imaginary line. On one side of this line there may be a right of trial by jury, and on the other side no such right. Each state prescribes its own modes of judicial proceeding." .
>
> "In each case the primary inquiry must be as to what is the system of law of the particular state, and whether, according to that law, as adjudged by its courts, the procedure in question is due process; and the secondary inquiry must be whether in that

process of law, if followed, there is any violation of the fundamental rights secured by the Federal Constitution." The Fourteenth Amendment, William D. GUTHRIE, p. 72.

In *Bank of Hamilton vs. Dudley's Lessee* (1829), 2 Pet., 492, 524, Chief Justice MARSHALL, answering the contention that the exclusive power of state courts to construe legislative acts do not extend to the paramount law, said:

> "We cannot admit this distinction. The judicial department of every government is the rightful expositor of its laws, and emphatically of its supreme law."

In *Green vs. Neal's Lessee* (1832), 6 Pet., 291, Mr. Justice McLEAN, for the court, says:

> "The decision of this question by the highest judicial tribunal of a state should be considered as final by this court, not because the state tribunal in such case has any power to bind this court, but because, in the language of the court in *Shel vs. Guy*, 11 Wheat., 361, a fixed and received construction by a state in its own courts makes a part of the statute law."

The foregoing language was used in a case in which, to follow the rule announced, the Supreme Court of the United States found it necessary to reverse its former decision in order to put its holding in harmony with that of the Supreme Court of the State rendered subsequent to its first consideration of the subject.

> "Long contemporaneous construction of an instrument is seldom erroneous, and is always deserving of great consideration, when the meaning of the instrument is obscure."

This language is quoted as approving from *Symonds vs. Cincinnati*, 4 Oh. St., 147, in the opinion in *Bauman vs. Ross*, in considering the meaning of "just compensation."

In the exercise of the power of providing for local public improvements, and levying special assessments to pay the whole or a part of the cost of such improvements, is the determination of the necessity for the improvement, the character of the improvement, the extent of the property that shall be assessed, and the amount of benefit that the land within the benefit district, and each tract thereof, sustains by reason of the improvement, a legislative or a judicial function? An answer to this inquiry, we apprehend, is determinative of the decisive issue in the case at bar. Until the case of *Norwood vs. Baker* was decided, the prevailing opinion of the bar of America, of the legislatures of America, and the courts of America was, it would seem, that the determination of each of these considerations lay within the province of the legislative department of government.

And we apprehend that opinion remains unshaken now except as to the single proposition as to whether it is a legislative or judicial function to determine the amount of benefit sustained by each tract of land within the benefit district.

The ordering of such an improvement, the laying and apportionment of the assessments to pay therefor, and the collection of those assessments are clearly the exercise of the power of taxation. This is a sovereign power. It is exercised by the people through the legislative department of their government. It is not a delegated power, but one necessary to and inherent in every stable government. The legislature is but the name of that branch of the government through which the power is manifested, and taxation is but the name applied to designate one of the manifestations of sovereignity.

> "The power to impose taxes is one so unlimited in force and so searching in extent that the courts scarcely venture to declare that it is subject to any restrictions whatever, except such as rest in the discretion of the authority which exercises it. It reaches to every trade or occupation; to every object of industry, use or enjoyment; to every species of possession; and it imposes a burden, which, in case of failure to discharge it, may be followed by seizure and sale or confiscation of property. No attribute of sovereignty is more prevading, and at no point does the power of the government affect more constantly and intimately, all the relations of life than through the exactions made under it." Cooley Const. Lim., 6th Ed., p. 587.

Chief Justice MARSHALL has said of this power:

> "The power of taxing the people and their property is essen-

tial to the very existence of government, and may be legitemately exercised on the objects to which it is applicable to the utmost extent to which the government may choose to carry it. The only security against the abuse of this power is found in the structure of the government itself. In imposing a tax, the legislature acts upon its constituents. This is, in general, a sufficient security against erroneous and oppressive taxation. The people of a state, therefore, give to their government a right of taxing themselves and their property; and as the exigencies of the government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator, and on the influence of the constituents over their representative, to guard them against its abuse." *McColloch vs. Maryland*, 4 Wheat., 316, 428.

The power of legislation is a co-ordinate power of equal service, of honor and worth with the judicial and executive powers. The judiciary is the arbiter to define the limits of each of these functions when the question arises as to whether either of the departments is confined to its legitimate sphere; but when in the exercise of the functions devolving upon them respectfully, each is supreme. The right of eminent domain, the exercise of police power, are sovereign rights. They, also, are legislative functions.

What is due process of law in the determination of rights between man and man is one thing? What is due process of law when the power of taxation is being exercised is another; when the power of eminent domain is exercisd is another; when the police power is being exercised, another. It must necessarily be so. Rights pertaining to person or property must vary according to the exigencies of the occasion; as in war and peace, or in a controversy between neighbors, or when the individual stands in contest with the good of all the people.

The right of trial by jury is declared by the Missouri Constitution to be inviolate. But that declaration does not mean that, when a person's property is to be taken from him for the benefit of the state, either in the exercise of police power or in the exercise of eminent domain or in the exercise of the more essential and all pervading power of taxation, he is entitled to a jury trial,

34019

or a trial by a judicial officer, as to the injury or benefit occasioned by the exercise of that power.

Underlying the power of taxation, whether exercised to collect general taxes or the cost of local improvements, as well as under the power of eminent domain, is this principle, or theory, that private property shall not be taken for public use without just compensation being made.

As applied to general taxes, the principle is satisfied by the legal presumption of the necessity, which springs from the sovereign act imposing the tax, that the taxpayer receives in the protection and security afforded by the general government to his person and his property and the promotion of his happiness, a just reward for that portion of his property taken at regular intervals for taxes; and as applied to local assessments, that the certain substantial and enduring improvement constructed for the use of the public in the vicinity of his land confers a benefit, an increasement of value, to his neighboring land, to an amount at least equal to the sum, or portion of the value of his land, taken to pay its just part of the cost of that improvement. In taxation the apportionment of the whole levy, that is, its exaction, is to be applied alike to all persons and property similarly situated. Each contributes his proportional part of the expense of a service or enterprise executed for the good of all. In the exercise of eminent domain, the property of a particular individual, when taken for public use, is considered as separate and distinct from that of all other individuals, and he is called upon to give it up, not as his proportionate contribution to the common good, but in the nature of a forced sale regardless of, outside of, and over and above, his proportionate contribution to the support of the government and his compensation therefor is paid in money. In taxation, both general or special, the exaction is compensated for, not in money, but in an advantage or benefit somewhat indefinite as to limits, always intangible, not always immediately present or known in the fullest extent, but none the less desirable to the taxpayer and essential to the public welfare. Both the power of eminent domain and taxation alike are exercised on the theory of adequate compensation for the exaction of property for the public use.

In *Kelley vs. Pittsburg* (1881), 104 U. S., 80, it is said by Mr. Justice Miller, for the court:

> "Taxes have not, as a general rule, in this country, since its independence, nor in England before that time, been collected by regular judicial proceedings in a court of justice. The necessities of government, the nature of the duty to be performed, and the customary usages of the people, have established a different procedure, which, in regard to that matter, is, and always has been, due process of law."

These words, nor shall property be taken for public use without just compensation, have been uniformaly held, even in the Norwood case, to apply to the exercise of the right of eminent domain and not to the exercise of the power of taxation. The judiciary of our state has drawn the distinction and enforced it in the coldest and boldest fashion. *Keith vs. Bingham*, 100 Mo., 300; *McQuiddy vs. Smith*, 67 Mo. App., 205.

And the respect in which this court hold the opinions of the state courts is experienced by the opinion in *Billingham etc. Co. vs. New Whatcom* (1898), 172 U. S., 320, decided since the Norwood case, thus: "Before proceedings for the collection by taxes sanctioned by the Supreme Court are stricken down in this court, it must clearly appear that some one of the fundamental guarantees of right contained in the Federal Constitution has been invaded."

Curiously illustrating the fertility of the human reason, the language of courts asserting the theory of special taxation, when the subject under consideration was whether constitutional restrictions on the taxing power applied to the exercise of the power in regard to special assessments, is now urged by our opponents as a limitation upon the authority of the legislature in respect to that subject. In no state has this theory been more emphatically stated than in early cases in Missouri;

Judge BLISS in *Neenan vs. Smith* (1872), 50 Mo., 525, says:

> "Local taxes for local improvements are merely assessments upon the property benefited by such improvements, and to pay for the benefit which they are supposed to confer; the lots are increased in value, or better adopted to the uses of town lots by the improvement. Upon no other ground will such partial taxation for a moment stand."

Again, WAGNER, J., for the court in *McCormick vs. Patchen* (1873), 53 Mo., 36, says: "The whole theory of local taxation or assessments that the improvements for which they are levied, afford a remuneration in the way of benefits."

To recognize the theory that the charge against each separate tract of land is to be compensated by the benefit conferred thereon is one thing, and to require a judicial inquiry in every individual instance to determine the adequacy of the amount of that compensation, or to strike down an assessment against a single lot because of hardship to the owner, is quite another thing. The same contention precisely can be raised in levying and collecting general taxes, if it is recognized in regard to special taxes.

> "Where the power which is exercised is legislative in its character, the courts can enforce only those limitations which the constitution imposes; not those implied restrictions which, resting in theory only, the people have been satisfied to leave to judgment, patriotism, and sense of justice of their representatives." Cooley's Const. Lim., 6th Ed., p. 153.

It is not the rule that legislation with respect to taxes is void unless even and exact justice is done in each instance, and the reasons why such rights are not and cannot be protected is clearly stated in many opinions.

> "It will be apparent from what has already been said, that it is not essential to the validity of taxation, that it be levied according to the rules of abstract justice. It is only essential that the legislature keep within its proper sphere of action, and do not impose burdens under the name of taxation which are not taxes in fact; and its decision as to what is proper, just and politic, must then be final and conclusive. Absolute equality and strict justice

are unattainable in tax proceedings. The legislature must be left to decide for itself how nearly it is possible to approximate so desirable a result. * * *

Nevertheless, no question of constitutional law is raised by these inequalities and hardships, and the legislative control is complete." Cooley Const. Lim., 6th Ed., p. 630.

"In the imposition of taxes, exact and critical justice and equality are absolutely unattainable. If we attempt it we might have to divide a single year's tax upon a given article of property among a dozen different individuals who owned it at different times during the year, and then be almost as far from the desired end as when we started. The proposition is utopian. The legislature must adopt some practical system; and there is no more danger of oppression or injustice in taking a former valuation than in relying upon one to be made subsequently." *Shaw vs. Dennis*, 10 Ill., 405; *People vs. Worthington*, 21 Ill., 171.

In *Henderson Bridge Co. vs. Henderson* (1899), 173 U. S., 831, Mr. Justice HARLAN, rendering the opinion of the court, says:

"But in order to bring taxation imposed by a state or under its authority within the scope of the Fourteenth Amendment of the National Constitution the case should be so clearly and palpably an illegal encroachment upon private rights as to leave no doubt that such taxation by its necessary operation is really spoliation under the guise of exerting the power to tax. As an act of Congress should not be declared unconstitutional unless its repugnancy to the supreme law of the land is too clear to admit of dispute, so a local regulation under which taxes are imposed should not be held by the courts of the Union to be inconsistent with the National Constitution unless that conclusion be unavoidable. All doubt as to the validity of legislative enactments must be resolved, if possible, in favor of the binding force of such enactments. * * *

"In determining a question of this character, the power to tax existing, a judicial tribunal should not enter into a minute calculation as to benefits and burdens, for the purpose of balancing the one against the other, and ascertaining to what extent the burdens imposed are out of proportion to the benefits received. Exact equality and absolute justice in taxation are recognized by all as unattainable under any system of government."

The same logic applies and the same reasons control the levying of special assessments.

In *Webster vs. City of Fargo* (1900), 82 N. W. Rep., 732, BARTHOLOMEW, C. J., after referring to both general and special taxes, said:

> "In each instance the tax is presumed to be for the benefit of every taxpayer in the taxing district. Yet experience teaches us every day that this is only a theory. It is not a fact, and never can be. But it must be adhered to as a theory, and accepted as a fact, or taxation must cease. The legislature may make a mistake. It may authorize a tax for a public purpose that ultimately fails to prove a public benefit in fact. But that does not affect the legislative power.
>
> "These general principles apply to and control special taxation and special assessments. * * * No reason can be assigned why the taxpayer in the special district should have any more right to raise that question than the taxpayer in the permanent district. It can never be correct to say that special assessments must be measured by special benefits, and can never exceed them. That is true in theory, but only in theory. In practice it cannot be enforced. The moment we concede that any one taxpayer has the right to the judgment upon the question of his benefits of any tribunal except the legislature or the body authorized by the legislature to decide the matter, that moment we defeat the power of the legislature to make or authorize special assessments."

In *King vs. City of Portland* (Dec., 1900), 63 Pac. Rep., 8, it is said, by WOLVERTON, J., for the court:

> "As a practical result in cities and large towns, the per foot mode of assessment reaches a just and equal apportionment in most cases. Hence this mode has been deemed a reasonable exercise of the taxing power in such places with a view to taxation according to the benefits received. Whatever doubt might have been originally entertained of it as a substitute (which it really is) for actual assessment by jurors or assessors under oath, it has been so often sanctioned by decision, it would ill become us now to unsettle its foundation by disputing its principle. But it is an admitted substitute, only because practically it arrives, as nearly as human judgment can ordinarily reach, at a reasonable and just apportionment of the benefits on the abutting properties. * * *
>
> It is beyond the power of human ingenuity to adopt any plan or mode of assessment that will operate to produce exact uniformity and all that may be expected is a reasonable approximation to such a standard, and the rule adopted under the charter (the front foot rule) fulfills the condition as applied to the present controversy."

In *Kelley vs. Chadwick* (1901), Sup. Ct. La. (not yet reported), NICHOLLS, C. J., for the court, in sustaining the front foot rule of assessing the cost of a street pavement since the Norwood case, says:

> "It certainly cannot be properly contended that the owner of a few feet of low or swamp land abutting on a public street can hold in check a work of special local benefit and also general public benefit, by interposing as a constitutional bar, that his individual property would not be benefited. If every individual citizen could raise such a separate issue and have the constitutionality or legality of the ordinance tested by or measured by the special effect of such ordinance on his own property, there would be no such thing as public progress. The special interest of a particular citizen would have to give way to the general good."

In the case of *Davidson vs. New Orleans*, 96 U. S., 97, the estate of John Davidson was assessed about $50,000 for draining certain swamp lands in the State of Louisiana. The assessment was levied according to the superficial area or square feet of land within the drainage district, that is, each square foot was taxed as much as every other square foot in the district.

No inquiry was had into benefits, and therefore, the assessment was not made according to judicially determined benefits. It was even agreed that no drainage was done on Davidson's land, and that a part of his land needed no drainage, as it had already been drained.

The question was squarely raised and presented whether the Fourteenth Amendment prohibited such an assessment. Mr. Justice MILLER wrote the opinion, in which all the court concurred, and held that the Supreme Court of the United States had no jurisdiction of the case, because the Fourteenth Amendment was not violated, and that class of cases did not fall within the provisions of the amendment. In the course of his opinion the learned justice says:

> "It is also said that part of the property of plaintiff, which was assessed, is not benefited by the improvement. This is a matter of detail with which his court can not interfere if *it were clearly so;* but it is hard to fix a limit within these two parishes where property would not be benefited by the removal of the

swamps and marshes which are within their bounds." This language is approved in *Fallbrook Irrigation District vs. Bradley* (1896), 164 U. S., 112.

It is submitted that the court there held the fact that an assessment against property for an improvement which was in fact no benefit to the particular property in the district did not bring the case within the Fourteenth Amendment; and it would be hard to conceive of a harder case.

Subsequently, in *Spencer vs. Merchant*, 125 U. S., 245, Mr. Justice GRAY said:

> "In *Davidson vs. New Orleans* it was held that if the work was one which the state had authority to do and to pay for by assessments on the property benefited, objections that the sum raised was exhorbitant or *that part of the property assessed was not benefited*, presented no question under the Fourteenth Amendment to the Constitution upon which this court could review the decision of the state court."

And in *Watson vs. Nevin*, 128 U. S., 578, Chief Justice FULLER said in reference to the Davidson case:

> "And the conclusion was reached that neither the corporate agency by which the work is done, the excessive price which the statute allows therefor, nor the relative importance of the work to the value of the land assessed, nor the fact that the assessment is made before the work is done, nor that the assessment is unequal as regards the benefits conferred, nor that personal judgments are rendered for the amount assessed, are matters in which the state authorities are controlled by the Federal Constitution. So the determination of the taxing district and the manner of the apportionment are all within the legislative power."

It was therefore ruled that an assessment for the construction of a street apportioned upon abutting land according to the number of square feet, although no inquiry was made as to benefits any more than in the Norwood case, fell within the doctrine of the Davidson case, and that the court had no jurisdiction.

If a property owner, who has been assessed under a general law providing for the apportionment of the cost of a local improvement according to a fixed rule, by alleging that his lot has been assessed with a sum as benefits in excess of the amount of the actual benefits sustained from that improvement, may thereby invoke the processes and rules of procedure applicable to the exercise of eminent domain, then under the constitutional law of the State of Missouri, if the property owner be a corporation, or if a corporation be interested in the proceeding, he will have the right to have the issue as to the amount of his damage tried and determined by a common law jury; which means, of course, a trial under the procedure of the common law with its rules of evidence and a jury unacquainted with the facts and circumstances of the case and without preconceived opinions concerning the issues involved.

> "The right of trial by jury shall be held inviolate in all trials or claims for compensation, when in the exercise of the said right of eminent domain any incorporated company shall be interested either for or against the exercise of said right." Mo. Const., Art. 12, Sec. 4.

To declare such a rule is for the court to say, in effect, that the power of taxation as heretofore exercised to secure local public improvements must be abandoned. It would be impossible to go through the maneuvers of notifying property owners, summoning jurors and witnesses, employing attorneys and conducting the procedure of a common law trial in order to determine the benefit to each lot by reason of paving one street a mile long at an expense less than the cost of the work, or to bring the proceeding to an end before those who were interested in its accomplishment should have passed over to that country from whose bourne no traveler returns, and where all the streets, mayhap, are permanently paved with gold and sanitary regulations are dispensed with.

The prevailing rule of the authorities, supported by the sounder reasons, declare that the rule of apportionment of the benefits arising from a public improvement is within the discretionary power of the legislative department of government. When this power is exercised unreasonably, so that in the entire scope of the legislative act property is confiscated, then the court is justified in declaring the legislative act as a whole unreasonable and void. But when the legislature, under the pretense of exercising the power of taxation, acts in the matter of acquiring an improvement and in designating the property within certain limits to pay the cost thereof, and provides a method of apportioning that cost upon some fixed basis of apportionment known and declared in advance, that is the solemn determination of the legislature that the property assessed is benefited by the improvement to the extent of the charge against the property, and the presumption obtains that the assessment is reasonable, just and equitable until the contrary is shown.

"The principle of these statutes is the same with that which supports assessments made through the intervention of assessors or commissioners. The benefits, actually or presumptively received, support the tax. Apportioning the cost by the frontage on the improvement is adopted by the legislature as constituting, in the judgment of its members, an apportionment in proportion to benefits as nearly as is reasonably practicable. This we understand to be substantially the view taken by the authorities." Cooley on Tax'n, 2nd Ed., p. 646.

The same principle has been frequently announced:

"In special taxation the imposition of the tax is, of itself, a determination that the benefits to the contiguous property will be as great as the burden imposed." *Craw vs. Village of Tolono*, 96 Ill., 256.

"When the legislature has adopted its method and standard of distributing the cost as constituting in its judgment, an apportionment in proportion to the benefits, as nearly as is practical, the judiciary should not be called on to interfere."

NICHOLLS C., J., in *Kelley vs. Chadwick*, La. (1901), not yet reported.

In *King vs. City of Portland* (1900), 63 Pac. Rep., 2, it is said:

"It is asserted with substantial unamity and great clearness by the courts in this country, as well as by text writers of crudition and learning, that, unless the nature of the case precludes it, the power to determine the confines of a taxing district for any particular burden is purely one of legislative discretion, and that the question of benefits accruing by reason of improvements contemplated is regarded as one of fact which the legislature is always presumed to have considered and settled by the enactment."

In *Hadley vs. Dague* (1900), 62 Pac. Rep., 500, it is said:

> "The mode in which the expense of the local improvement shall be borne, as well as the district which is to bear such expense and the manner in which the expense is to be distributed, is a legislative question."
>
> "An apportionment of the cost that would be just in one case would be unfair and oppressive in another. For this very reason the power to determine when a special assessment shall be made, and on what basis it shall be apportioned, is wisely confided to the legislature, and could not, without the introduction of some new principle in representative government, be placed elsewhere." Cooley on Taxn., 2nd Ed., p. 622.

These words, nor shall any state deprive any person of property without due process of law, conferred no legislative authority upon the courts.

They announce no new principle. Doubtless all the State Constitutions at the time of the adoption of the Fourteenth Amendment embodied a similar principle and law as well as the more specific injunction, nor shall private property be taken for public use without just compensation. In fact this principle was one of common law in most of the states, for we had it from Magna Charta. The sole effect of the writing of these words in the Constitution by the adoption of the Fourteenth Amendment, was to transfer the supreme authority of deciding what is due process of law, from the highest court of the state to the Supreme Court of the United States. The principle, the law, the right, the thing, the substance, was not changed. The final arbiter alone was changed. And so far as the thing criticised in this law, so far as the right which is now denied, so far as the method now called in question is concerned, that thing, that right, that method, was the established rule and principle and law of the people of America at the time, they, by their voices, made the Supreme Court of the United States the judge of what is the law of the land. And for this court now, to decline to recognize the statute in force at that time, and the decisions of the courts constructing and fortifying the validity of those statutes against the objection now urged and many others, and to refuse to be controlled by them, but to adventure to wipe them out and to reverse them, is for the judiciary to assume, and to exercise, the power of legislation in violation of the fundamental law which limits the activities of the court to the exercise of judicial functions.

The Missouri Constitution, Art. III, declares:

> "The powers of government shall be divided into three distinct departments—the legislative, executive and judicial—each of which shall be confided to a separate magistracy, and no person or collection of persons, charged with the exercise of powers properly belonging to one of those departments, shall exercise any power properly belonging to either of the others except in the instances in this constitution expressly directed or permitted."

The Constitution of the United States declares in Art. 1, Sec. 1: "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives," and in Art. 1, Sec. 8: "The congress shall have powes to lay and collect taxes. * * *

We submit, in the light of the decisions of the State and Federal courts cited in this brief, and of the statutes and customs and practices of the people under them covering three generations of men, during which various and vast rights of property have accrued and become vested under them, and in view of the wide spread approval of those customs and practices and their wonderful efficiency in providing for the comfort and happiness and health of the people of rapidly growing cities, that the matter of the apportionment of the cost of a street pavement among the tracts of land within the benefit district (that district being broad enough to included lands whose aggregate benefit is at least equal to the cost of the work), is a legislative function, and that he who asks this court to overrule those decisions and annul those laws, blasphemes the conscience and judgment of mankind.

X.

Village of Norwood vs. Baker Considered:

Village of Norwood vs. Baker (1898), 172 U. S., 269, is relied on to reverse the judgment of the Supreme Court of Missouri. That was a suit in equity to cancel assessments levied against the parts of Baker's land abutting on a new street, to pay the cost of condemning such street through her tract of land. The condemnation ordinance of the village provided that a strip of land fifty feet wide by three hundred feet long should be taken from the center of her tract for public use; the ordinance required that the benefit district should be limited to the land abutting on either side of the new street one hundred and fifty feet in depth, which included no other than the Baker lands, and required that the cost of the land taken together with all the expenses incident to the proceeding, including surveyors' charges, counsel fees and witness fees, be assessed against the land within the benefit district according to the frontage thereof on the new street. *This ordinance* considered in connection with the general law, providing the basis of assessing the cost of the improvement to be according to frontage, was held to be void. The controlling facts in that case differ from the case at bar in the following respects:

First: The taking part of a tract of land for a street does not necessarily benefit the part or parcels of the tract remaining after the appropriation; while it is a self evident truth that the paving of a street does benefit the property abutting thereon.

Second: The legislative act declared unconstitutional in the Norwood case, was a mere ordinance of the village applicable to a single tract of land; that involved in this case is the Charter of Kansas City which has the same force and dignity as a general law of the State and is applicable alike to all persons at all times, and by which a general system is established for the paving of all streets and collecting the cost of such pavements.

It is also to be noted that, under the plan or device adopted by the Village of Norwood, although Baker might have been allowed every process of law to enable her to recover the true value of her land taken, and a hearing as to how the value of the land taken should be apportioned over the benefit district, she could in no event, unless the limits of the benefit district were enlarged, when the whole account was settled, have recovered a cent for the land taken, nor could she have accomplished more by her efforts than to increase the amount of her cash outlay, by reason of, and to the extent of, the expense of the proceeding.

The trial judge summarily disposing of the Norwood case below says:

> "Granting, for the sake of argument, that where property is appropriated for a street, the compensation to the owners and expense of making the appropriation may be assessed upon the several owners, each bearing his proper share, quite a different question is presented when, as here, a municipality undertakes to appropriate to public use, the real estate of a single owner for a public street, and then assess back upon him, not only the compensation awarded for the entire street but also all expenses of the proceeding." *Baker vs. Norwood*, (1876), 74 Fed., 997.

The vigorous opinion of JACKSON, J., in *Scott vs. Toledo* (1888), 36 Fed., 385, is also instructive as to this point of difference. It must be borne in mind, too, as was said in the opinion of the court delivered by Mr. Justice HARLAN, in *C. B. & Q. R. R. vs. Chicago* (1896), 166 U. S., 226, that:

> "The mere form of the proceeding instituted against the owner, even if he be admitted to defend, cannot convert the process into due process of law, if the necessary result be to deprive him of his property without compensation."

In the language of this court in *Parsons vs. District of Columbia:*

> "It is trite to say that general principles announced by courts, which are perfectly sound expressions of the law under the facts of a particular case, may be wholly inapplicable in another and different case; and there is scarcely any department of the law in which it is easier to collect one body of decisions, and contrast them with another in apparent conflict, than that which deals with the taxing and police powers."

The members of this court did not agree among themselves, as to the effect of the Norwood decision upon a state of facts like the one now before us. It is certain that the majority opinion does not overrule the case of *Parsons vs. District of Columbia Mattingly vs. District of Columbia*; and therefore, we say the majority of the Supreme Court have distinguished the Norwood case from the case at bar.

The proposition, that the taking of a part of a piece of real estate for a street, does not necessarily enhance the value of the remainder, needs little consideration to demonstrate its truth. Improvements of great cost may be interfered with and partly taken by the appropriation, to the destruction of the entire value of the remainder of the improvement. The tract of land as a whole may be such size and shape and location as to be peculiarly adapted to some particular use, and its greatest value may be for that use. By taking a portion of it, the value of the whole tract and of the remaining portion, for that use, may be totally destroyed, and thereby its average area value decreased. The appropriation of a part may leave the remaining portion or portions in such shape as to be in reality, of little value for any purpose. The Constitution, laws and decisions of Missouri, allow the abutting owners in street condemnation and street grading proceedings a trial, on notice, and in some instances a jury trial, as to the damage occasioned to remaining lands by reason of taking a part of the one tract for public use. Mo. Const., Art. II, Sec. 21; Art. XII, Sec. 4; K. C. Charter, Art. VII, Secs 2, 3, 5; Art. VIII, Secs. 5, 7, 9.

No one will contend that the proper and adequate paving of a street can damage abutting property. By paving, is not meant the opening or changing the grade of a street, nor a cause of action based on the negligent construction of the work; for injuries growing out of either of these circumstances, the owner under Missouri Constitution and laws is entitled to remuneration and a jury trial. Paving cannot be legally done under the Kansas City Charter until the street is opened and brought to its permanent grade. It has become dedicated to public use for passage, for traffic, for service; and what adds to its efficiency in the purpose of its dedication of necessity cannot be said to be a damage to land abutting on the street. In the recent case of *Conde vs. City of Schenectady* (1900), 58 N. E. Rep. (N. Y.), 150, decided since and distinguished from the Norwood case, it is said:

> "That the land abutting on the street is benefited by the pavement or repavement of the street and should bear the expense, seems clear."

Mr. COOLEY, in his work on Taxation, 2nd Ed., p. 148, says:

> "In large cities the (street) pavement becomes absolutely essential and must be made by the owners of adjoining property if not provided for by the public."

It is said by the St. Louis Court of Appeals in *Lohrum vs. Eyerman* (1878), 5 Mo. App., 481:

> "If the street, when raised to the required grade, were left without paving so as to render it difficult or dangerous to travel, the property charged with the special tax bill would be inaccessible and probably worthless.' This (street pavement), while beneficial to the general public, is a greater and special benefit to the property holder whose lot abuts upon the street."

The record in the Norwood case, as outlined in the courts, opinion, does not disclose that any showing was made that the land within the benefit district was not benefited to the extent of the charge made against it. And if it was intended by that opinion to hold that such an ordinance as the one there involved was on its face, unconstitutional and void, either because the judicial conscience was not satisfied that the benefit district was not broad enough, or because the rule of apportionment was according to the frontage, or because but one person's land was included in the benefit district, we challenge the correctness of the decision. The marking out of the district, the determination of the amount to be assessed against the lands in the district, the basis of the apportionment of the charge among the lands in the district, are within the limits of the legislative jurisdiction or discretion reasonably employed, while in the exercise of the power of taxation. The sovereign people in the manner according to the forms marked out by constitutions, laws and immemorial customs were acting; and they pronounced the judgment that the lands within that district were benefited to the extent of $2218.58, and that the lands within that district shared the benefit according to the frontage on the new street.

It is all true, as stated by Chief Justice GANTT, in the vigorous opinion of the Supreme Court of Missouri in this case, that Mrs. Baker would give up to public use, a strip of her land fifty by three hundred feet in dimension and could not, if that proceeding were conducted to a final conclusion as contemplated, get back one cent in money for the land taken. But it is also true that the sovereign people, acting according to lawful forms, determined and declared that Mrs. Baker's lands—not as her lands but by establishing limits, whether intentionally or not, that included no other, they were limits that are established, we venture to say, in the majority of all similar condemnation proceedings conducted in villages and western cities—were benefited by the opening of this street to the extent of the amount charged against them. This determination made by the legislature was not conclusive, but was presumptively right. The presumption is one of fact and is to be indulged until there is a showing of fact to the contrary. The legislature undoubtedly had the jurisdiction to establish that district. It exercised authority within the limits of its sphere of action in so doing, and for the judiciary to decline to give credence either to the integrity of the judgment or the reasonableness of the judgment, of a co-ordinate branch of government acting within its sphere, is to usurp an authority that has not been committed unto it, is to violate a law as sacred, as potent for good, as the one which declares that private property shall not be taken for public use without due process of law.

It may have been—there was no showing—that the owners of the property on either side of Mrs. Baker's lands, had given the fifty feet of ground through their lands necessary to open Ivanhoe avenue up to the limits of the Baker tract, and had been moved to give the land by the selfish consideration, that in so doing the remainder of their lands were thereby made of more worth in the market than they would have been without the street.

Village or city lands are not valuable on the same basis as farm lands, according to the extent of the tract, but are made valuable to a large extent by reason of certain street frontages. Now, the record discloses that before the condemnation proceeding, Mrs. Baker had a frontage of three hundred and fifty feet of land on Williams street, for fifty feet of which she was allowed forty dollars a foot, or a full sum of two thousand dollars. After the condemnation, her frontage was decreased fifty feet on that street and she had six hundred feet additional on the new street, making a total street frontage, after the condemnation of nine hundred feet, in the place of the three hundred and fifty feet she had before the transaction; or if we eliminate the side street frontage entirely by reason of the changed conditions, she was, after the street was opened, the owner of six hundred feet of street frontage as against three hundred and fifty feet before. If the new frontage is to be valued on the same basis as the old, her entire property, instead of being worth fourteen thousand dollars was then worth twenty-four thousand dollars. If this basis of value measures her benefit, then the exprassions in the opinion that "the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him," are inapplicable to the facts in that case, and are *obiter dicta*. For her whole tract would be worth eight thousand dollars more after the condemnation than the whole was worth before, as the result of the opening of the street.

We do not say that the facts in this case show that Mrs. Baker's land remaining after the street was opened through it, was more valuable than the whole of it was before, but we do say the record shows the declaration of a competent authority to the effect that such was the fact, and we do say that no proof was adduced or offered to the contrary, and we draw the conclusion that this court was led to contravene well established principles of law in declining to entertain the presumption, when the fact to be presumed was within the range of reason and common experience, that a co-ordinate branch of government of equal dignity with the judicial department, had acted with justice and reason and for the best interest of the sovereign people whose voice it spoke.

It is said by Justice HARLAN in the Norwood case:

> "It will not escape observation that if the entire cost incurred by a municipal corporation in condemning land for the purpose of opening or extending a street, can be assessed back upon the abutting property, without inquiry in any form as to the special benefits received by the owner, the result will be more injurious to the owner than if he had been required, in the first instance, to open the street at his own cost, without compensation in respect of the land taken for the street; for, by opening the street at his own cost, he might save at least the expense attending formal proceedings of condemnation. It cannot be that any such result is consistent with the principles upon which rests the power to make special assessments upon property in order to meet the expense of public improveprovements in the vicinity of such property."

Under the Kansas City charter—and all of its provisions must be construed together in determining whether it violates the requirements of due process of law—the cost of all incidental expenses in a paving proceeding, such as engineering costs, plans, supervision and inspection, are required to be paid from the general fund; the same is true in our law as to condemnation proceedings; and in paving proceedings only the actual cost of the labor and material used, is allowed to be charged against the abutting property. And a special assessment can only be enforced in a law suit against the owner of the land, in which action the owner may raise the issue whether the ordinance requiring the work to be done, construed in connection with the general law which fixes the benefit district commensurate with the limits of the property abutting on the improvement, or, in case of unplatted lands, extending back therefrom one hundred and fifty feet, is reasonable, either upon the ground that the assessment against all the lands within the benefit district exceeds the amount of special benefit to such lands, or upon any other adequate ground. That he shall have such a hearing under our law, and that succeeding in his contention, the assessment involved is void, is uniformly held by the state courts of Missouri.

Corrigan vs. Gage (1878), 68 Mo., 541; *Halpin vs. Campbell* (1880), 71 Mo., 493; *Kansas City vs. Morton* (1893), 117 Mo., 446; *Morse vs. Westport* (1896), 136 Mo., 276; *Skinker vs. Heman* (1899), 148 Mo., 349.

We do not contend that in Missouri, the owner of a single lot within a benefit district, has a right to raise the issue, in a suit brought to collect the special tax bill, or any other suit; that the assessment against that particular lot considered alone and without reference to the assessments against other property in the benefit district exceeds the benefit to that lot, but that fact under the proper pleading may be considered with other competent evidence in determining the reasonableness of the improvement ordinance.

Mr. Justice HARLAN'S questions are suggestive. He inquires:

> "Does the exclusion of benefits from the estimate of compensation to be made for the property actually taken for public use (as required by the Ohio Constitution), authorize the public to charge upon abutting property, the sum paid for it, together with the entire cost incurred in the condemnation proceedings, irrespective of the question whether the property was benefited by the opening of the street?"

There is the coloring of the Ohio constitutional law developed here. We in Missouri have no such constitutional restriction, but under our law, the commissioners qualified to assess Mrs. Baker's damages arising from the taking of part of her land for public use, and the jury and court whose services under our law, she, under certain circumstances could have subsequently invoked, might have allowed her no damage for the property taken if found that the special benefit to her adjoining lands by reason of the condemnation, equaled the value of the lands taken from her.

If the thoughtful Justice means to propound the inquiry; Can lands abutting on street improvement be charged with the entire cost of the improvement, together with the costs incurred in bringing about that improvement, such as incidental expenses, irrespective of the question whether the property was benefited by the improvement or not? the answer in the first place is, that under the charter, whose validity is now questioned, no such incidental expenses can be charged as a part of the special assessment, for they are regarded with us as a part of that general cost of government that should be borne by all the subjects of the government; and as to whether the naked cost of a public improvement can be assessed against lands irrespective of whether the property is benefited by the improvement, we unhesitatingly say, No. But that answer does not determine the gist of the problem before the court; which is, Who had the right, the legislature or the court, under the customs and laws underlying taxation, to determine, not absolutely but primarily, whether the property assessed is benefited by the improvement?

The same learned justice again says:

> "The guaranties for the protection of private property would be seriously impaired, if it were established as a rule of constitutional law, that the imposition by the legislature upon particular private property of the *entire* cost of a public improvement, irrespective of any peculiar benefits accruing to the owner from such improvement, could not be questioned by him in the courts of the country."

This is very true; but it is far from conveying the meaning given it by our opponents, that the legislative department of government has no discretion, no jurisdiction, to determine primarily whether a public improvement will benefit lands in a particular district, and in what ratio that benefit, if it exists, is shared by the several tracts of land in the district.

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XI.

THE PRACTICAL QUESTION:

Unless we strike out of our laws the whole theory and practice of special taxation, it is pertinent to enquire:

By what method shall the benefit from a street pavement to separate tracts of land be determined, and by what measure shall the total benefit conferred by the improvement to those lands be distributed?

Three methods are suggested:

First. In the ratio of the value of the real estate affected.

Second. According to the actual benefits sustained by each tract of land, as determined by commissioners upon notice to the property owners.

Third. According to the frontage of the respective tracts of land upon the part of the street improved.

The first method has been suggested by Judge Philips in *Fay vs. Springfield* as being less instinct with inequality than the last. My research has failed to disclose a single state in which such a rule is enforced. I mean the apportionment of street improvements according to the value of the real estate—ground and buildings included. This method then can be said not to be popular. True, this is the rule usually adopted in levying general taxes. But the decisions, with scarcely any exceptions, hold that while special assessments are made by the exercise of the taxing power, they are based upon an entirely different principle, and that even the constitutional restrictions in regard to general taxes have no application to special taxes. Many practical objections to such a rule are obvious. It would tend to retard the city's upbuilding. Some private owners would hold back improving their lots until the public improvements were all constructed. It would tend to influence the owners of the very valuable property to make a small paving district so as to include a short stretch of street extending only in front of their own lots with the result of patchwork improvements. A lot owner having a large investment in the improvement upon his lot, under this rule might be taxed five times the sum charged against his less progressive neighbor for the common improvement, and the neighbor might, immediately after the tax was assessed, erect a similar improvement on his lot and then be similarly situated with his neighbor at one-fifth the cost. A learned court has declared:

> "Appraising market values and fixing the proportion according to them is open to favoritism or corruption and other objections." *Hammett vs. Phila.*, 65, Pa. St., 146.

The second method is ideally constitutional. Here the cost is apportioned by commissioners after the property owners have notice to appear, etc. No lawyer will deny that the assessment of two such commissioners, presumably appointed by the council, actually by the member from the ward in which the street is located, could be made final.

Would the unbridled discretion of such a commissioner, subject to the bias of political prejudice, personal favoritism, or corrupt influences, in the long run, to say nothing of the expense and trouble property owners would incur in presenting their cause before such a tribunal, do justice more evenly or adequately and to the more general satisfaction of those to be taxed, than some other rule of apportionment?

And is the judiciary to lay down fixed rules to such a commission, as to what consideration they shall give to the fact that the lot to be charged is vacant or improved, above or below the grade of the street, is short or deep, is occupied by a grandee having a dozen equipages, or by a laborer with no other vehicle than a wheelbarrow?

The front foot rule of assessing the cost of street pavements is to be commended because the amount of work and the cost of the improvement in front of each foot of property is the same. Every property owner, or every person who contemplates owning property, may know in advance approximately what burden the abutting land will be called upon to pay for such improvements, and can take that fact into consideration in determining its value or the character of its use. He need not fear an unexpected and extortionate burden by reason of political influence, or the unwise judgment of the petty officers to whom may be committed the discretion of fixing the amount of this burden. The foreknowledge and certainty of the amount of the charge is the best security against an oppressive charge. At least it gives the property owner the data upon which to appeal to the council to lighten the burden by modifying the improvement, or imposing a part of the cost on the public at large.

Adam Smith is impressed with the value of certainty as an element of a tax, he says:

> "The tax which each individual is bound to pay ought to be certain and not arbitrary. * * * The certainty of what each individual ought to pay is, in taxation, a matter of so great importance that a very considerable degree of inequality it appears, I believe, from the experiences of all nations, is not near so great an evil as a very small degree of uncertainty." The Wealth of Nations, Vol. 2, Book 5, Chap. 1, Part II, p. 352.

Lands in a city are valuable in direct proportion to their accessibility and in proportion to the number of people passing in front of them. Improvements represent a fixed item in determining the value of real estate, namely; the cost of reproduction. The value of the land is subject to indefinite expansion; and it is a matter of the most common knowledge and experience in a community which has the policy that obtains in Missouri with reference to the improvement of streets, that the laying of a street pavement increases the value of abutting property at least to the extent of the cost of the work. And the record shows that the pavement involved here had that effect on the lands abutting upon it. It must be remembered that the law under consideration, applies to cities and not to farm lands; that streets are usually parallel to one another, and that lands extend from the street back a reasonable distance so as to make the fact of a street exposure the most material consideration in the determination of the value.

If it be objected that this rule will work a hardship on the owner of a narrow lot situated on a street corner when the side street is paved, it is to be observed that the workings of the whole law, are to be considered in determining its effects, and while the burden is heavy for paving the side street, it is light when the paving of the front street is to be paid for; and as all city streets must be paved, the combined burden of the two improvements is as light as can be made under any fixed method of assessment. The charter provides that no plat of lots in the City shall be recorded,or have any validity, unless first approved by the Board of Public Works (K. C. Charter, Art. 7, Sec. 8). And such unreasonable and unfavorable conditions as a narrow strip of land along the street are in this manner guarded against, if any further obstacle to that condition were needed, than the foreknowledge of the purchaser of this fixed rule of charging the cost of street pavements according to the frontage.

It is a well recognized and legitimate application of the power of taxation to enforce, in addition to the primary aim of taxation, a municipal policy by the regulation or restraint of tendencies inimical to the best development of the city. The front foot rule is commendable as a check upon the unworthy purpose of the property owner in holding a narrow strip of land along a street to prevent the improvement of the street, or to keep back the improvements of the land behind it, until its owner yields to an unconscionable demand to pay an extortionate sum for a street frontage. Cooley on Taxn., 6th Ed., pp. 12, 587.

The Kansas City Charter, Article IX, Section 2, confers on the mayor and common council, the authority to pay the whole or part of the cost of street pavements out of the general fund. It is to be presumed, at least until an instance is presented in the court of the taking, or confiscation of property by an exorbitant charge, that these officers would exercise their authority to prevent that result, in case of a tract of land which by its peculiar shape would be unduly burdened by an assessment apportioned according to its frontage upon the improvement.

The fact as to whether the surface of a lot is above or below the grade of the street is hardly worth considering with reference to apportioning the cost of paving a street, for if above or below grade it must be brought to grade in order to be of use for business purposes, and this change can be brought about at the will of the owner. If one lot is improved and the adjoining one unimproved, the paving of the street will be recognized at once as a benefit to the improved property because a conveniece has been added; but it is equally true that the adjoining vacant lot is likewise benefited, because it is made equally accessible, and the fact that numerous people frequent the adjoining lot by reason of the pavement, renders the vacant one susceptible of improvement or sale to advantage.

As to the foot rule, Judge Cooley, in his work on Taxation, has said:

> "Such a measure of apportionment seems at first blush, to be perfectly arbitrary, and likely to operate in some cases with great injustice, but it cannot be denied that in the case of some improvements, frontage is a very reasonable measure of benefits—much more than value could be—and perhaps approaching equality as nearly as any other estimate of benefits made by the judgment of men." *Cooley on Taxation*, p. 644.

And Mr. Elliott, in his well considered work on Roads and Streets, has said that:

> "The system which leads to the least mischievous and unjust consequences, is that which takes into account the entire line of the way improved, and apportions the expense according to the frontage; for it takes into consideration the benefit to each property owner that accrues from the improvement of the entire line of way, and does not impose upon one lot owner an unjust portion of the burden." (p. 396).

And Mr. Justice Sharswood, speaking for the Supreme Court of Pennsylvania, says:

"Perhaps no fairer rule can be adopted than the proportion of feet front, though there must be some inequalities if the lots differ in situation and depth."

He further says:

"No system of taxation which the wit of man ever devised has been found perfectly equal." (65 Pa. St. 146).

Chancelor NICHOLSON, in *English vs. Mayor of Wilmington* (1896), 2 Marvel, 63, observes what is especially emphasized by the statutory laws hereinbefore referred to, that,

"The method of apportionment adopted by the legislature in this case (front foot rule) seems to have become increasingly popular of late years throughout the Union."

Under the laws establishing the procedure for which we contend, fortified and supported as they have been by the judiciary of the states which have enacted them, the municipalities of the land have grown wondrously and developed along lines of comfort and convenience and healthfulness far beyond the fond thought of city builders of former generations. The problems which confront the municipality in this day are not those involved in the building and maintenance of the alley-streets of ancient cities with dogs for city scavangers, or the building of a single narrow thoroughfare of fourteen or eighteen feet in width like the Appian Way. The demand of this day is that all city streets be made passible, sanitary, light-bringing and beautiful; that city areas be adequately sewered. No power developed by this municipal energy has been exercised with so great efficiency, and, at the same time, with such an unanimous approval of the persons affected, as that legislative authority which has directed that the cost of such improvements be borne by those whose property is specially benefitted thereby, and has determined that benefit by a fixed and general law established in advance of the improvement, applicable to all persons alike, to be, that the several properties abutting on a street paved are benefitted by such pavement to the extent of the reasonable cost of the work in accordance with the frontage.

The courts of New Jersey deny to the legislature, the power to provide in advance, a fixed rule for apportioning and assessing the cost of street pavements. As illustrative of the effects of the policy of that state the following excerpt from the suggestive work on Municipal Government in Continental Europe, page 298, by Albert Shaw, is pertinent:

> "Jersey City and Newark, * * * their streets are probably the meanest and foulest in the whole world."

Either as the result of the criticised method of laying assessment, or from some other factor not indicated, the achievements of Kansas City in municipal development have been such as to occasion remark by this diligent student of municipal affairs. Comparing cities of the old with those of the new world he says:

> "Those who regret the rapid disappearance of the quaint and old-fashioned in European cities, must be shocked at the changes which a few years have made in the principal places of Belgium. Parts of these towns are now not unlike parts of * * * Kansas City in their freshness and newness and in the general character of their architecture." (Same work, page 226).

It is axiomatic that the construction of a pavement on a city street does not damage the property abutting on it. A street is dedicated for use, for service, for passage. A pavement reasonably constructed in the very nature of things adds to that efficiency. *Gibson vs. Owens* (1892), 114 Mo., 258. I speak especially with reference to this section of the earth on which we live, where the soil is so rich and deep that mud or dust is the incident of the unimproved street with alternate seasons. Of course I do not mean to say that abutting property may not be damaged by the change of grade of a street, which may occur concurrently with the paving, or by the negligent execution of the work. But for such damages the property owner is guaranteed compensation by the Constitution and laws of this State irrespective of the work of paving. And our laws, if they are executed, afford ample security against such damages.

It is equally true that the sewering of urban property, in the very nature of things, is a prime necessity in developing that property for the city use. It adds to the uses to which it may be put and adds a value to the land whether there is immediate use made of the improvement by the owner of the property or not.

If a benefit from an improvement is acknowledged and no damage has been occasioned by reason of it, it cannot be said in the light of the authorities cited, that the legislature may not apportion that benefit among the lands benefited.

The rationole of the rule has never been better stated than in the language of Mr. Justice **Brewer** in the dissenting opinion in the Norwood case:

> "The legislative Act charging the entire cost of an improvement upon certain described property is a legislative determination that the property described constitutes the area benefited, and also that it is benefited to the extent of such cost."

It is to be said to the credit of our own western state which has adopted and enforced the method of assessing the cost of street pavements and sewers now called in question, in most of its cities, and has tested the method by an actual experience of more than three-quarters of a century, that it of the states of the Union has developed up to this time two cities, which, as shown by their bank clearings, stand among the first ten cities of the Union in the volume of business transacted. And in this method Kansas City, by law adopted by the practically unanimous voice of its qualified voters, has, within less than four dozen years, been transformed from a rugged wilderness to "a good place to live in," and become the best paved city of its population in the world. And this has been accomplished, so far as the records of our courts show, without the confiscation of a foot of private property.

Laws like the one under consideration, have been held invalid since the decision in Norwood-Baker case in *Loeb vs. Trustees* (N. Y., Jan., 1890), 91 Fed., 37; *Fay vs. Springfield* (Mo., May, 1899), 94 Fed., 409; *Charles vs. Marion* (Ind., Dec., 1899), 98 Fed., 166, 100 Fed., 538; *Lyon vs. Tonawanda* (N. Y., Dec., 1899), 98 Fed., 361; *Cowley vs. Spokane* (Wash., Feb., 1900), 99 Fed., 840; *Parker vs. City of Detroit* (Mich., July, 1900), 103 Fed., 357; *Bidwell vs. Hoff* (Ga., July, 1900), 103 Fed., 362; *Hutcheson vs. Storrie* (Tex., 1899), 51 S. W., Rep., 848; *Sears vs. Street Commissioners* (1899), 173 Mass., 350. (To the contrary, however, is *Sears vs. Board of Aldermen* (1899), 173 Mass., 71).

These are the progeny of *Norwood vs. Baker* unlawfully begotten. The judges in deciding them have followed, as they expressly state, what they conceive to be the ruling of this court in the Norwood case.

The Loeb case has reached a decision in this court *Loeb vs. Trustees of Columbia Township*, December, 1900), and it is held in the opinion of the court by Mr. Justice HARLAN that the constitutional proposition in support of which the opinion of the trial judge is cited, was not necessary to the determination of the controversy involved. The judgment of the learned trial court was reversed, and it may be said that his remarks relative to the proposition now before this court are *obiter dicta*.

The next case in order is *Fay vs. Springfield*. The opinion cited was rendered by the learned trial judge upon a motion for temporary injunction, upon a bill in equity which showed upon its face that the Federal Court was without jurisdiction; and the bill in that case was dismissed before final hearing for that reason. The learned judge, however, in granting the motion for temporary injunction, says:

> "Following what I conceive to be the ruling of the Supreme Court in the Village of Norwood case, the temporary injunction asked for is granted."

Then came *Charles vs. City of Marion*, and in the opinion cited, which was on motion for a temporary injunction, the learned judge says:

> "Prior to the decision of *Village of Norwood vs. Baker*, the Supreme Court of this state (Indiana) and of many other states, had held that state legislation providing for an assessment of the cost

of street and alley improvements by the measurement of the front line of the lots along and in front of which such improvements were made, was valid."

With these precedents interpreting the Norwood case, the other Federal decisions followed in the order above named. When *Bidwell vs. Huff* (1900), was considered, the fact was, which is shown by the opinion of the learned trial judge to be true, and it should be borne in mind as determining the weight to be given to this authority, that the attorneys on both sides conceded the law to be invalid. The trial judge says, as a culmination and climax to his argument demonstrating the confiscatory nature of a front foot assessment for the cost of a street pavement:

> "Indeed, it is conceded by the counsel for all parties, save the City of Macon, that this assessment is null and void. To quote the language of Mr. Anderson in his forcible argument for the defendant. 'Our contention is that the paving assessment, just as set up in this bill, is absolutely void and contrary to the Constitution of the United States.' "

As against these authorities, we refer to the following cases as giving the better and wiser interpretation of a sober second thought of the learned and suggestive opinions in the *Village of Norwood vs. Baker.*

Sears vs. Board of Aldermen (1899), 173 Mass., 71; *Gleson vs. Waukesha county* (1899), 103 Wis., 225; *Schroeder vs. Overman* (1899), 61 Oh. St., 1; *Adams vs. City of Shelbyville* (1900, Ind.), 57 N. E. Rep., 114; *Hadley vs. Dague* (1900 Cal.), 62 Pac. Rep., 500; *City of Augusta vs. McKibben* (1901 Ky.), 60 N. W. Rep., 291; *Cass Farm Co. vs. City of Detroit* (1900 Mich.), 83 N. W. Rep., 108; *Heman vs. Allen* (1900), 156 Mo., 534; *Barber Asphalt Paving Co. vs. French* (1900 Mo.), 58 S. W. Rep., 924; *Hill vs. Swingley* (1900 Mo.), 60 S. W. Rep., 114; *Conde vs. City of Schenectady* (1900 N. Y.), 58 N. E. Rep., 130; *Webster vs. City of Fargo* (1900 N. Dak.), 82 N. W. Rep., 732; *King vs. Portland*, (1900 Ore.) 63 Pac. Rep., 8; *City of Harrisbury vs. McPherrin* (1900), Superior Court of Pa. (not yet reported); *Kelley vs. Chadwick* (1901), La. (not yet reported).

XII.

VESTED RIGHTS:

The annual reports of the Board of Public Works during the four years last past show that Kansas City has during that period, built sidewalk and roadway pavements, sewers and grading work, of the value of $2,822,-885.81, and paid for them in special tax-bills issued against abutting lands according to the frontage or area standards. These assessments are usually payable in four annual installments. Kansas City has one-eight of the total population of all Missouri cities which pay for such improvements in this way. The Charter contains a restriction (K. C. Charter, Art. 9, Secs. 3, 10, 16) upon the power of the city to incur a personal obligation for the value of the work where the ordinance and contract therefor undertake to stipulate that it shall be paid for by special assessments, and this provision has been upheld. *Saxton vs. St. Joseph*, 60 Mo., 153; *Kelley vs. St. Joseph*, 67 Mo., 491; *Keating vs. Kansas City*, 84 Mo., 415.

There are now outstanding and unpaid special tax-bills, executed by Missouri cities alone, representing many millions of dollars in value, which were issued to discharge the obligations of those cities upon fair contracts and taken by the holders in consideration of a transfer by them of wealth of equal value to the face of those bills.

Fortified in ancient laws and decisons of the highest court special tax bills in the western and southern states pass in the financial circles like municipal bonds. Bankers and investors of all classes buy them. Who can estimate the amount of property; or the number of persons, in all the States to be effected by the overturning of this line of State decisions? Many titles have been transferred or perfected under the principle of these decisions, and in Missouri three years are allowed to all persons to prosecutet writs of error;and infants, insane persons and married women are allowed a stated period after disabilities are removed to do so.

> "It will of course sometimes happen, that a court will find former decision so unfounded in law, so unreasonable in its d ductions, or so mischievous in its conseqences as to feel compelle to disregard it. Before doing so, however, it would be well t consider whether the point involved is such as to have become rule of property so that titles have been acquired in reliance upo it and vested rights will be distributed by any change; for in suc a case it may be better that the correction of the error be left t the legislature, which can control its action so as to make it pros pective only and thus prevent unjust consequences." Cooley Const. Lim., 6th Ed., p. 66.

In *Sparrow vs. Kingman*, 1 N. Y., 246, 260, BRON SON, J., it is said:

> "After an erroneous decision touching rights of property ha been followed thirty or forty years, and after a much less time the courts cannot retrace their steps without committing a new error nearly as great as the one at first."

In *Pratt vs. Brown*, 3 Wis., 603, SMITH, J., it is said:

> "It is true that when a principle of law, doubtful in its character or uncertain in the subject matter of its application, has been settled by a series of judicial decisions and acquiesced in for a considerable time, and important rights and interests have become established under such decisions, the courts will hesitate long before they will attempt to overturn the result so long established."

Will this case be determined in blindness to this condition while the court is engaged in an endeavor to float the bauble of theory beyond the established domain of the constitutional restriction on the power of States against depriving any person of his property without due process of law?

XIII.

CONCLUSION:

It may be the hope of the judiciary to sustain the system of special taxation for local improvements and while doing so, effectuate a distribution of the cost of the work amongst the properties benefited in the precise ratio in which the several properties are advantaged by it. But as long as opinions differ as to the effect of a cause, as long as municipal arears and improvements are notlaid off and created according to an unalterable design, as long as the conditions of lots with reference to the improvement and their uses and values are subject to sudden change and great transformation during the life of the improvement, as long as circumstances are in a measure disposed by the delightful uncertainty of human purpose, and laws (even when determined by the judiciary) are to be administered by human instrumentalities, that hope will remain unrealized.

The law, as administered by the courts, will be satisfied with any efficient method of special taxation established by the legislature whose effect is to apportion the cost of a public improvement, which results in a special benefit to a limited locality and adds an increment of value to lands in that locality, with reasonable fairness and equality among the benefited lands in that locality, whether the extent of the territory benefited and the amount of tribute exacted from each property (that is, its benefit) be determined by the legislative authorities or by judicial proceedings. What is reasonable and fair is to be determined in the enlightened judicial conscience guided by the usages and practices in that respect, and the long established opinions of enlightened men.

The disposition of this whole subject by the Kansas City Charter is to be had in mind before one feature of it is condemned. The Charter provides that the cost of sidewalking, curbing and paving streets and alleys in the city may be charged against abutting lands according to their frontage (or out of the general fund); that the cost of sewers may be assessed against the lands in a previously established sewer district (which is supposed to be established with reference to an intelligent drainage of a certain area to be determined by topographical and other conditions) according to the area of the several tracts; the cost of acquiring lands for all public uses and the apportionment of that sum against benefited lands, the benefit district having been at the outset determined by the mayor and council, are both determined by judicial proceedings; the *damages* occasioned by the change of grade or grading of a street are required to be determined and the sum allowed therefor apportioned amongst the lands in the benefit district, which district is determined in the outset by the mayor and council, in a judicial proceeding; and finally the *cost* of grading a street, after all damages for *taking* or *damaging* property incident to the completed work have been ascertained and paid, is charged against adjacent lands extending back from the improvement one-half block in the case of platted lands, and where the lands are unplatted extending back one hundred and fifty feet, according to value.

No improvement can be ordered under the Charter until the property owners are first notified by the publication of a resolution of the council, declaritory of its intention in respect to the improvement. The owners of a majority of the front feet owned by residents of the city, may, by remonstrance, debar the council of the power to order the improvement, or they may by petition determine its character, or they may appear in person and under the general right which every American soverign has to petition or importune, or enforce his representative in the council to do what is expedient and right, cause more or less or all of the cost of the pavement to be paid from the general fund. K. C. Charter, Art. 9, Sec. 2.

The reasonableness of these benefit districts is in our state uniformily held to be a question of law to be passed upon when challenged by the courts. The reasonableness of the improvement ordinance, taken as a whole, of which, of course, the provision of the general law as to the method of apportioning the cost is a part, is in our state subject to the challenge of any person interested, and that question is to be determined by the court. *Corrigan vs. Gage* (1878), 68 Mo., 541; *Halpin vs. Campbell* (1880), 71 Mo., 493; *Kansas City vs. Morton*

(1893), 71 Mo., 446; *Morse vs. Westport* (1896), 136 Mo., 276; *Skinker vs. Heman* (1898), 148 Mo., 349.

No special tax lien can be enforced except in a regular judicial proceeding wherein the defendant may have a jury, and in which the improvement ordinance or proceeding may be attacked as unreasonable, or the action be defended by reason of any mistake or error in the assessment, or that the work was not done in a good and workmanlike manner, or in accordance with the contract, or that the proceedings are not, or have not been, conducted in compliance with controlling laws.

We respectfully submit that the Charter, in the respect considered, is a fair, reasonable and efficient law, whether tested by the analysis of the theorist, or the more reasonable ordeal of experience. If crudities do appear, which is not doubted, are not the intelligence and public enterprise of the qualified voters of this city, to whom God, in his goodness, has given no greater boon than the right, in-so-far as purely municipal affairs are concerned, of governing themselves, competent to better the law?

We respectively submit that no Federal question is involved in this controversy and that the judgment of the Supreme Court of Missouri should be affirmed.

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APPENDIX.

KANSAS CITY CHARTER PROVISIONS.

Art. 3, Sec. 1. The mayor and common council shall have the management and control of the finance and all of the property, real, personal and mixed, belonging to the corporation, except as in this charter is otherwise provided; and likewise shall have power, by ordinance: * * *

Fifth. *Street—Opening of—Pipes under—Sidewalks.*—To have exclusive control and power over the streets, sidewalks, alleys, landings, public grounds and highways of the city; to establish, open, alter, widen, extend, grade, pave, repave, block, reblock, sprinkle or otherwise improve, clean and keep in repair the same; to prevent and remove all encroachments thereon, or obstructions thereof; to put drains and sewers in the same, and to regulate or prohibit the building of vaults and areas under sidewalks; to enforce and regulate connections with sewers, gas and water mains, and conduits of all kinds laid in or under the streets and highways of the city for any purpose.

Art. 9, Sec. 2. *Streets and sidewalks—Paving—Construction and repairing—Payment in special tax bills—Board of Public Works recommendation—Remonstrance—Petition.* The city shall have power to cause to be graded, regraded, constructed, reconstructed, paved, repaved, blocked, reblocked, graveled, regraveled, macadamized, remacadamized, curbed, recurbed, guttered, reguttered or otherwise improved or repaired, all streets, alleys, sidewalks, avenues, public highways and parts thereof and to construct and reconstruct sidewalks and to sod and plant trees along the side or sides thereof, to be paid for in like manner as such sidewalks are paid for or as part of the costs and expenses of the construction or reconstruction of such sidewalks, within the city at such times and to such extent, of such dimensions and with such materials, and in such manner and under such regulation, as may be provided by ordinance, and to pay therefor out of the general fund or by issuing special tax bills as herein mentioned; provided, that whenever the common council shall deem it necessary to pave, repave, block, reblock, gravel, regravel, macadamize or remacadamize any street, alley, avenue, public highway or part thereof, within the limits of the city, and payment for such work and improvement is to be made in special tax bills, the common council shall, by resolution, declare such work or improvement to be necessary, stating the kind of paving material proposed to be used, and such resolution or the substance thereof, shall be published for ten days, Sundays included, in the newspaper doing the city printing, and unless the resident owners of the city, who own a majority in front feet of all the lands belonging to such residents and fronting on the street, alley, avenue, public highway or part thereof to be improved, shall, within thirty days from the first day of such publication, file with the city clerk a remonstrance, signed by them, against the proposed improvement, then the common council shall have power to cause the proposed improvement to be made and to issue special tax bills therefor, as herein mentioned; provided, however, that no such resolution or ordinance shall be passed by the common council except upon the recommendation of the board of public works indorsed thereon; and provided, further, that if the resident owners of the city who own a majority in front feet of all the lands belonging to such residents and fronting on the street, alley, avenue, public highway or part thereof to be improved, shall, within thirty days after the first day of the publication of such resolution, file with the board of public works a petition, signed by them, to have such street, alley, avenue, public highway, or part thereof, paved, repaved, blocked, reblocked, graveled, regraveled, macadamized or remacadamized with a different kind of material or in a different manner from that specified in such resolution, then the ordinance providing for the doing of such work or making such improvement, shall provide that the work shall be done in the manner and with the material specified in such petition, and in such case the ordinance need not be recommended by the board of public works as aforesaid. If the remonstrance of the resident property owners above mentioned shall be filed with the city clerk, as herein provided, then the power of the common council to make the proposed improvement and pay therefor in special tax bills shall cease until a sufficient number of the persons so remonstrating or their grantees shall, in writing, withdraw their names, or the property represented by them from such remonstrance so that said remonstrance shall cease to represent a majority of the resident property owners, as above provided, when the common council may proceed in the manner above mentioned, to cause the proposed improvement to be made; provided further, however, that if the board of public works shall unanimously recommend to the common council that any business street, alley, avenue, public highway or part thereof, be paved, repaved, blocked, reblocked, graveled, regraveled, macadamized or remacadamized, and the payment therefor is to be made in special tax bills, and the common council shall, by ordinance, order such work to be done by a vote of two-thirds of the members elect of each house of the common council, then such work may be done without any resolution, as hereinbefore provided, and regardless of such remonstrance. When the work shall be so recommended by the board of public works and so ordered by the common council as last above mentioned, the resident owners of the city who own a majority in front feet in the lands belonging to such residents and fronting on such street, alley, avenue, public highway or part thereof to be improved, shall have the right to select the material with which such street, alley, avenue, public highway or part thereof shall be paved, repaved, blocked, reblocked, graveled, regraveled, macadamized or remacadamized from not less than two kinds of materials, to be designated by the board of public works, such selection to be made by them within ten days after such ordinance shall have taken effect, and been published for ten days in the newspaper at the time doing the city printing, which selection shall be by petition in writing, addressed and delivered to the board of public works. If such selection be not made within such time, then the board of public works shall designate the material with which such street, alley, avenue, public highway or part thereof shall be improved.

Sec. 3. *Payment for improving streets—Ordinances and contracts to specify how to be made.* All ordinances and contracts for all work authorized to be done by section two of this article shall specify how the same is to be paid for, and in case payment is to be made in special tax bills, the city shall in no event, nor in any manner whatever, be liable for or on account of the work.

Sec. 6. *Grading—Assessment to pay for—Duty of assessor—Cost of other work—Engineer to compute and apportion—Special tax bills.*—After a contract shall have been made for the grading or regrading of any street, sidewalk, avenue or public highway, or part thereof, the city assessor shall, on demand of the board of public works, if the work is to be paid for in special tax bills, cause an assessment to be made of the value of all the lands to be charged with the cost of such grading or regrading, exclusive of improvements thereon, and shall deliver such assessment to the board of public works to compute the costs thereof, and apportion such cost among the several lots or parcels of land to be charged according to the values thereof, fixed by the city assessor, as aforesaid, and charge each lot or parcel of land with its proper share of such cost. When any work other than grading or regrading, as last aforesaid, shall be completed, and is to be paid for in special tax bills, the board of public works shall cause the city engineer to compute the cost thereof, and apportion the same among the several lots or parcels of land to be charged therewith, and change each lot or parcel of land with its proper share of such cost according to the frontage of such land. The board of public works shall, after the cost of any work has been so apportioned for payment in special tax bills, except as hereinafter provided, make out and certify in favor of the contractor or contractors to be paid, a special tax bill for the amount of the special tax, according to such apportionment against each lot or parcel of land to be charged.

Sec. 7. *Sidewalks and curbing—Contracts to repair for year—Payment in special tax bill—Land to be charged.*—The board of public works may, according to ordinance, let or enter into a contract or contracts, for not over a year at any one time, to reconstruct or repair sidewalks and curbing, and such other similar work which may be ordered by ordinance, or may become necessary to be done and be ordered by the board of public works during the year. The cost of such reconstruction and repairs shall be charged as a special tax against the particular lot or lots, or parcel or parcels of land, fronting on the spot where such work may be done: provided, that the cost of reconstructing or repairing any sidewalks or curbing shall be charged on the land adjoining that side of the street, avenue or public highway where the spot repaired may be. The board of public works, after the doing of any such work according to any such contract, shall compute, apportion and charge the cost thereof on the land liable, and make out and certify, except as hereinafter provided, in favor of the contractor or contractors to be paid, a special tax bill against each lot or parcel of land liable for its share of such costs.

Sec. 8. *Sewers—Classes of—Through private land*—The general sewer system of the city shall be divided into four classes, to-wit: public, district, joint district and private sewers. No sewers shall be run diagonally through private land when it is practicable, without injury to said sewer, to construct it parallel with one of the exterior lines of such land, nor shall any public sewer be constructed through private land when it is practicable to construct it along or through a street, avenue, alley or other highway.

Sec. 9. *Public sewers—Establishment and construction of—Cost of how paid—Bed of natural stream reclaimed—Land assessed with benefits—Application of fund.*—Public sewers shall be established and constructed at such times, to such extent, of such dimensions and materials as may be approved by the board of public works, and under such regulations as may be provided by ordinance, and these may be extensions or branches of sewers already constructed or to be constructed, or entirely new throughout, as may be deemed expedient. Public sewers shall be paid for out of the general fund of the city; provided, however, that if in the construction of any public sewer the bed or channel of any natural stream or water course is reclaimed and made valuable to the owners thereof, or real property subject to overflow is reclaimed therefrom, in whole or in part, and made valuable to the owners thereof, or real property adjoining such public sewer is otherwise specially benefited, then the common council may provide that such real property, or any of it, shall be assesssed for special benefits, and the funds derived therefrom shall be used and applied toward the cost and construction of such public sewer. Such assessment may be made and collected in such manner as may be provided by ordinance.

Sec. 10. *District Sewers—Change of district—Construction and material of—Cost—Apportionment—Tax bills.* District sewers shall be constructed within the limits of the districts heretofore or hereafter established by ordinance, as each case may be. Any sewer district heretofore or hereafter established may be sub-divided, enlarged or changed by ordinance at any time previous to the construction of any district sewer therein. But no such district shall be sub-divided, enlarged or changed after a district sewer shall have been constructed therein. The city may, with the approval of the board of public works, from time to time, cause a district sewer or sewers to be constructed in any sewer district heretofore or hereafter established, whenever the common council may deem such sewer necessary for sanitary or other purposes, and such sewer or sewers shall be of such dimensions, material and character as shall be prescribed by ordinance, and any district sewer heretofore or hereafter constructed may be changed, diminished, enlarged or extended, and shall have all the necessary laterals, inlets and other appurtenances which may be required. As soon as the work of constructing, changing, diminishing, enlarging or extending any district sewer shall have been completed under a contract let for the purpose, the board of public works shall compute the whole cost thereof, and apportion and charge the same as a special tax against the lots of land in the district, exclusive of the improvements, and in the proportion that their respective areas bear to the area of the whole district, exclusive of the streets, avenues, alleys and public highways, and shall, except as hereinafter provided, make out and certify in favor of the contractor or contractors to be paid, a special tax bill for the amount of the special tax against each lot in the district. The city shall in no event nor in any manner whatever be liable for or on account of the cost of work done in constructing, changing, diminishing, enlarging or extending any district sewer, except as hereinafter provided.

Sec. 11. *Joint district sewers—Construction of—Cost of—Tax* *bills.* Joint district sewers may be constructed by the city as follows: Whenever the city may deem it necessary that a sewer should be constructed in any part of the city containing two or more sewer districts it may, by ordinance, unite such sewer districts into a joint sewer district and cause a sewer to be contructed therein in like manner in all respects, as is provided in section ten of this article in cases of district sewers, except in cases of joint district sewers the city may, if deemed proper, provide in the ordinance creating such joint district sewer, that the city shall pay a certain sum to be specified in said ordinance toward the payment of the cost of such joint district sewer, and should the common council by ordinance unite two or more sewer districts into a joint sewer district for the purpose of constructing a joint district sewer therein, the action of the common council shall be conclusive for all purposes, and no special tax bills shall be held invalid or be affected on account of the included drainage area thereof, or the size, character or purpose of such sewer; provided, however, that no sewer district shall be included in such joint district which is not contained in the natural drainage area of the valley or water course in which the joint district sewer is proposed to be constructed. The contract for the construction of such sewer shall specify that the city shall be liable for the sum so specified to be paid by the city, and that the remainder of such cost thereof shall be paid in special tax bills, to be issued in any manner that is or may be provided for the issuing of tax bills for the construction of sewers.

Sec. 16. *Tax bills—Board of public works—Delivery of tax bills—Receipt on register.* The board of public works shall, after making out and certifying any special tax bills as aforesaid, in this article provided for, cause the same to be registered in full in their office and deliver such special tax bills to the party in whose favor made out for collection and take the receipt of such party therefor at the foot of the register in full of all claims against the city on account of the work for which such tax bills have been made out.

Sec. 4. *Resolution—Remonstrance—Recitals in ordinance—Business streets—Objections to tax bills.* When it shall be proposed to pave, repave, block, reblock, gravel, regravel, macadamize or remacadamize any street, alley, avenue, public highway or part thereof, and pay therefor in special tax bills, if the common council shall, by ordinance, find and declare that the resolution provided in section two of this article has been published as therein required and that the resident owners of the city who own a majority in front feet of all the lands belonging to such residents fronting on the street, alley, avenue, public highway or part thereof to be improved, have not filed with the city clerk a remonstrance against the doing of such work, or a petition for the making of such improvement with a different kind of material or in a different manner from that specified in such resolution, or that such petition was filed for the doing of the work as mentioned in said ordinance, such finding and declaration shall be conclusive for all purposes, and no special tax bill shall be held invalid or affected for the reason that such resolution was not published as therein required, or that a remonstrance or petition sufficiently signed was filed as therein required, or that such petition was not filed or was insufficiently signed. When the city shall propose to pave, repave, block, reblock, gravel, regravel, macadamize or remacadamize any street, alley, avenue, public highway or part thereof, without resolution of the common council declaring such improvement to be necessary, but upon the unanimous recommendation of the board of public works, if each house of the common council shall, by ordinance, find and declare by a vote of two-thirds of the members-elect of each house that the street, alley, avenue, public highway or part thereof, on which the proposed improvement is to be made, is used or occupied for business purposes, and that the improvement has been unanimously recommended by the board of public works, such finding and declaration shall be conclusive for all purposes, and no special tax bill that may be issued to pay for the work shall be held invalid or affected for the reason that the work for which they have been issued was not unanimously recommended by the board of public works, or that such street, alley, avenue, public highway or part thereof was not, in fact, used or occupied for business purposes.

Sec. 5. *Payment in special tax bills—Assessment district—Improvements excluded—Lots and blocks—Question as to, determined by common council—Sidewalks, curbing and guttering—Cost of work on, how paid—Work done at street intersection—Cost of, how charged.* The cost of all work mentioned in the preceding sections of this article shall, when the same is to be paid for in special tax bills, be apportioned and paid as follows, viz: The cost of all grading, including grading of sidewalks, shall be charged as a special tax on all lands on both sides of the street, avenue or public highway, or part thereof, graded within the following limits, viz: In case any of the land fronting on the street, avenue or public highway, or part thereof graded be laid off in lots or blocks, property so laid off, from the line of the street, avenue or public highway, back to the center line of the block or blocks, shall be so charged, whether fronting on the street, avenue, or public highway or not; nevertheless the common council shall have power by ordinance, to prescribe that such land shall not be charged beyond the alleys in such blocks, if deemed just and equitable; and in case any land fronting on such street, avenue, or public highway, or part thereof graded, be not laid off into lots and blocks, then the land so not laid off, and the land in the rear thereof, on the line of the street, avenue, public highway, or part thereof, graded back one hundred and fifty feet, shall be so charged, whether fronting on the street or not; and lands liable for such grading shall be charged according to the value thereof, exclusive of improvements thereon, as provided in the next succeeding section, and in cases of question on the part of the assessor or the board of public works as to whether any lands fronting on the street, avenue or public highway, or part thereof, be laid off into lots or blocks or not, within the meaning of this section, the common council shall, on the request of the assessor or board of public works, in making out special tax bills and charging the land for such grading, determine whether or not any particular land or lands fronting on the street, avenue, public highway, or part thereof, graded, be laid off or not into lots and blocks within the meaning of this section, and such determination shall be conclusive on all parties interested for all purposes. The cost of all work on any sidewalk, including curbing and guttering along the side thereof, exclusive of the grading of the same, shall be charged as a special tax upon the adjoining lands according to the frontage thereof on the sidewalk. The cost of all other work specified in the first three sections of this article on all streets, avenues, alleys and public highways, or parts thereof, shall be charged as a special tax on the land on both sides of and adjoining the street, avenue, alley or public highway, or parts thereof, improved, according to the frontage thereof. The cost of all work mentioned in the first three sections of this article done on spaces fronting on any other street, avenue, alley, or public highway, shall be deemed part of the cost of work done on other spaces under the same ordinance and contract, and be charged and paid for accordingly.

Sec. 17. *Tax bills—Certifying apportionment to city treasurer—Record by city treasurer—Statement furnished taxpayer—Notice of issue of tax bills—Payment to city treasurer.*—As soon as the cost of any work, payable in special tax bills, as in this article provided, has been completed and by the board of public works apportioned among the several lots or parcels of land charged therewith, the said board of public works shall, before delivering the tax bills to the contractor, or his assignee, entitled thereto, certify such apportionment to the city treasurer, which apportionment shall contain the names of the owners and parties interested in the several lots and parcels of land affected and charged therewith who were such at the date when the work was accepted by the engineer or the board of public works, such names to be determined and taken from the city assessor's books at the time, but no defect or mistake in said books or in the names in such apportionment shall impair or affect the validity of the tax bills. The city treasurer shall, immediately upon the receipt of such apportionment, enter the assessments therein contained in appropriate books to be kept for that purpose, showing the property assessed, the title and date of approval of the ordinance providing for the improvement for which such tax bills are issued, the amount and date of the assessment and rate of interest thereon, which book shall be denominated "special tax record." Such record shall be complete and full and show all special tax bills, if any, issued under this charter and all benefit assessments arising out of condemnation and grading cases made under the provisions of articles vii and viii, respectively, of this charter, which may be in his hands for collection, against any lot or parcel of land in Kansas City. Any and all special assessments therein contained, whether arising out of the issuance of special tax bills, as in this article provided, or by virtue of the verdict or report of juries or commissioners in said condemnation or grading proceedings respectively, shall be considered for the purpose of collecting and receiving payment thereof. as special taxes against any lot or parcel of land, against which the same may be a lien, and upon application to the city treasurer for the amount of general city taxes against any lot or parcel of land in Kansas City, said treasurer shall also furnish to the party making such application, a list of all special tax bills and such benefit assessments against such lot or parcel of land as appears by said record at that time. Immediately upon receipt of such apportionment, the city treasurer shall give notice, by mail or otherwise, as provided by ordinance, to the parties named in such apportionment, of the issuance of the tax bill against the lot or parcel of land in which they appear to be interested, as appears by such apportionment, describing such lot or parcel of land, and stating in general terms for what purpose issued, the amount, rate of interest, and when and where payable. Any person owning or interested in any lot or parcel of land, against which a special tax bill may be issued under the provisions of this charter, may pay the same to the city treasurer, whose duty it shall be to receive the amount thereof, without charge or commission, and to issue to such person duplicate receipts therefor, showing from whom received, the date, the amount of such tax bill, with a description of the land, as described in such bill; the original of such receipt shall be countersigned by the auditor and delivered to the person entitled thereto, the duplicate thereof shall be filed by the auditor in his office, and he shall enter a memorandum thereof in a book kept for that purpose.

The city treasurer shall cancel and mark paid the amount of suc tax bill so paid on the record thereof, and such entry shall be evi dence of the payment as stated, and said lot or parcel of land shal be discharged from all lien on account of such tax bill so paid, from that date. The person to whom any such tax bill may b issued, or the assignee thereof, shall be entitled to receive th money so paid to the city treasurer, on the delivery to the city auditor of such special tax bill, duly receipted in full, who shall fil the same in his office and draw a warrant upon the city treasure in favor of the party so entitled to receive the same, for the amoun so paid to the city treasurer on account of such special tax bill, which warrant, before it shall be paid, shall be countersigned by the comptroller. Failure to comply with the provisions of this section shall not vitiate or impair any tax bill, nor shall the execution of the provisions of this section, or failure or defect in executing the same, impair or vitiate the general city taxes on any lot or parcel of land. The common council may by ordinance consistent with the provisions of this charter further regulate the keeping of the records by the city treasurer of special tax bills and benefit assessments against private property arising out of the provisions of articles vii and viii of this charter, and the collection of such assessments by execution and sales of the private property against which the same may be a lien.

Sec. 18. *Tax bills—Payment—Cancellation—Lien—Suit on—Jurisdiction of court—Evidence—Defenses—Interest—Assignable—Execution—Sale by sheriff—Certificate of purchase—Redemption—Deed—Contribution when owner of individual interest in land compelled to pay whole tax bill.*—Every special tax bill may be paid to the owner or holder thereof and upon presentation of such tax-bill, marked paid, to the city treasurer he shall cancel and mark paid the amount of such tax-bill on the record thereof, which entry, when made, shall have the same effect to discharge the lot or parcel of land affected by such tax-bill from the lien thereof, as if the amount of such tax-bill had been paid to the city treasurer as in the preceding section, provided, and such entry shall be evidence of payment of the tax-bill as therein stated. Every special tax-bill issued under the provisions of this article shall be a lien upon the land described therein, upon the date of the receipt to the board of public works therefor, and such lien shall continue for two years thereafter, but no longer, except as in this article otherwise provided, unless suit shall be brought to collect the same within two years from the issue thereof, in which case the lien shall continue until the determination of the legal proceedings to collect the same, including any sale of the property charged; provided, however, that if such suit shall be brought within the two years the plaintiff or plaintiffs therein shall at the time or within ten days after the commencement of suit, and not later than thirty days after the end of the two years, in person or by attorney or agent, file in the office of the city treasurer, a written statement showing the tax-bills sued on, and when and in what court, and against whom the said suit has been brought. The city treasurer shall, immediately after the filing of any such statement, note on the record of such tax-bill the time of filing of such statement and the substance of the same. If the plaintiff or plaintiffs in such suit shall fail to file such statement within the time above limited, the land described in the tax-bill sued on shall be free from the lien of the tax-bill and of any judgment in such suit, no matter when rendered, and shall not be sold in satisfaction of any such judgment. Every special tax-bill, if paid within thirty days from the date of issue, shall bear no interest, if not paid within such time shall bear interest from the date of issue at the rate of ten per cent per annum, except as herein otherwise provided. No such tax-bill need give the name of any party owning or interested in the land charged and bound by the lien, and before the suit the owner of any part in severalty or of any individual interest in any land charged by any tax-bill may pay his share separately, in which case his part or interest shall not be further liable in case of suit. Such tax-bill shall be issued within twenty days from the completion and acceptance of the work, but the failure to issue them within such time shall not affect the validity of the tax-bills. All or any of the owners of the land charged, or of any interest or estate therein, may be made defendant in any suit, but only the right, title, interest and estate of the parties made defendants in any such suit shall be affected or bound thereby, or by the proceedings therein. In case any owner of the land or interest therein shall be unknown, or a non-resident of the state, suit may be brought against such owner separately or together with others, and such unknown or non-resident owner may be proceeded against and charged by giving notice, either by publication in a newspaper or otherwise, as in a suit in the circuit court of Jackson county, to enforce any other lien on land in the county. Every such special tax-bill and the lien thereon shall be assignable and any assignee may sue in his own name. It shall be sufficient for the plaintiff in any suit to plead the making and issuance of the tax-bill sued on, giving the date and contents thereof, and the assignment thereof, if any, and to allege that the party or parties made defendants, own or claim to own the land charged, or some estate or interest therein, as the case may be, and to file the tax-bill in the suit. Special tax-bills against different lots or parcels of land, owned by the same party or parties made defendants, may be joined in one suit, but a separate judgment on each tax-bill shall be rendered and execution shall be issued accordingly. Every tax-bill shall, in any suit thereon, be *prima facie* evidence of the validity of the bill, of the doing of the work and of the furnishing of the material charged for, and of the liability of the land to the charges stated in the bill: provided that nothing in this section shall be so construed as to prevent any defendant from pleading and proving in reduction of any bill, any mistake or error in the amount thereof, or that the work therein mentioned was not done in a good and workmanlike manner; and, provided further, that if any party shall plead any mistake or error in the amount of the bill, or that the work was not done in a workmanlike manner, and that such party, before the commencement of the suit, tendered to the contractor or holder of the bill the full value of the work done and shall establish the same on trial, the recovery shall only be for the amount so tendered and judgment for costs shall be rendered against the plaintiff; and provided further, if it shall be pleaded and proved that the work for which the bill was issued was not done according to the terms of the contract made by the contractor with the city, then the plaintiff or plaintiffs shall recover thereon only the actual value of the work done, if of any value, and if not of any value, the judgment shall be for the defendant. No suit on any tax bill shall be defeated or affected by any irregularity affecting any other bill, or matter rendering any other bill invalid in whole or in part. In a suit on any special tax bill the judgment shall be special that the plaintiff shall recover the amount found due, including interest, together with costs, to be levied and made off the land described in the tax bill, and a special execution shall issue to sell the land to pay any such judgment, interest and costs. The judgment, exclusive of costs, shall bear interest at the same rate as the tax bill. Suits on special tax bills issued under this article may be brought in any court of competent jurisdiction. When the amount due on any tax bill shall not exceed $300 suit may be brought thereon in the circuit court of said Jackson county or before any justice of the peace of the city or of Kaw township in said county; but to enforce any judgment rendered by any justice of the peace a transcript of the judgment shall be filed in the office of the clerk of the circuit court of Jackson county, at said city, and duly docketed, recorded and indexed as a judgment of that court; whereupon a special judgment may be issued out of the court the same as if the judgment had been rendered in that court. Upon sales made by the sheriff under any such special execution, he shall issue to the purchaser a certificate of purchase, setting forth the substance of such special execution, the date of sale, the purchaser, the property sold, and the amount bid. If the property so sold be redeemed within one year from the date of such sale, by payment to the sheriff of the amount due on said judgment, including interest and costs up to the date of redemption, by the owner or party interested in the said property, no deed shall be given by the sheriff. Upon such redemption, as herein provided, of any lot or parcel of land sold under such special execution the judgment against the same and the lien thereon shall be satisfied on the record of such judgment in the office of the clerk of the circuit court aforesaid by said clerk upon presentation of the receipt of the sheriff for the amount necessary for redemption. If the lot or parcel of land so sold be not redeemed, as herein provided, a deed shall be given at the end of one year from the date of said sale by the sheriff to the holder of said certificate. Such deed may be given to the original holder of such certificate or his assignee and shall vest all the right, title, interest and estate in the land so sold that the defendants and each of them owned at the time that the lien of the tax bill commenced, or acquired afterward, and every such special judgment, as herein provided, shall bind all the right, title, interest and estate in the land that defendants and each of them owned at the time that the lien of the tax bill commenced or acquired afterward. Proceedings on special executions on judgment on special tax bills shall, except as herein provided, including the making of deeds to purchasers, conform as far as practicable to proceedings on other special executions from the circuit court. Such certificate of purchase shall be delivered by the sheriff to the purchaser, or his assignee, on payment of the amount bid, which certificate shall be executed and acknowledged by such sheriff before an officer authorized to take acknowledgments of instruments affecting real estate, and shall be filed for record in the office of the recorder of deeds of Jackson county, at Kansas City, within six months after the date of same. Parties interested in the land not made defendants shall not be affected thereby, and if they claim, through or under any party defendant, by right acquired before such suit was brought, may redeem from the purchaser or otherwise assert their rights according to equity and good conscience. In case the owner of any undivided interest or particular estate in any land charged, be compelled by suit to pay on account of any such tax bill more than he ought equitably to pay, as between him and others interested in the land, such owner so paying shall be subrogated to the lien of such tax bill, and may, by proper proceedings in any court of competent jurisdiction, enforce such lien and have the equities between such owners so paying and other parties interested in the land adjusted, though such other parties were not parties defendant to the original suits in the tax bill, and though such subsequent proceedings may be commenced after two years from the issue of the tax bill, and the lien of the tax bill shall continue after the two years for the purpose of such remedy, or the owner so paying shall be entitled to contribution from others according to equity without enforcing the lien.

Sec. 19. *Tax bills—Corner lots—Charge against—Contract for different kinds of work—Repairing.*—In making out special tax bills against corner lots for work on sidewalks, other than grading and for work in curbing, they shall be charged for work on both fronts and on the outside corners. A single contract may be let and entered into to do various kinds of work when payment is to be made therefor in special tax bills; and when any kind of work shall be fully completed, tax bills therefor may be issued; but in the case of a general contract for repairs, as provided in section seven of this article, tax bills may be issued from time to time as separate jobs of repairing may be done.

Sec. 22. *Petitions and remonstrances to be canvassed—Certificate as to.*—Whenever petitions for or remonstrances against public improvrments are required by this charter to be signed by resident property owners, the board of public works shall canvass the same and ascertain whether the signatures thereon represent a majority of front feet owned by resident owners of the property to be improved and certify the result of such canvass to the common council, and such certificate shall be *prima facie* evidence of the facts therein stated.

Sec. 23. *Streets—Paving and other improvements—Payment for in installments—Interest—Suits to collect—Objections to tax bills to be filed—Lien and assignment of tax bills—Other provisions concerning.*—The common council may by ordinance provide that special tax bills issued for the grading, regrading, paving, repaving, construction, reconstruction, blocking, reblocking, graveling regraveling, macadamizing, remacadamizing, curbing, recurbing, guttering, reguttering, or the construction or reconstruction of sidewalks, including sodding and planting of trees, or other improvement of any street, alley, sidewalk, avenue, public highway or part thereof, or the construction of sewers, shall be made payable in four equal installments, and such tax bills, when issued, shall be payable and collectible as follows: The first installment shall become due and collectible on the 31st day of May next succeeding the date of issue of the tax bills, provided, that if such period is less than thirty days after the issue of the tax bills, then the first installment shall become due and collectible on the 31st day of May of the next year; the second installment shall become due and collectible in one year, the third installment in two years, and the fourth installment in three years after the first installment is due and collectible as above mentioned; provided, however, that the owner of the property charged with the payment of such tax bills, or the owner of any interest therein, shall have the privilege of paying the same in full at any time before the expiration of thirty days from the date of the issue thereof; and provided further, that the owner of the property charged with the payment of such tax bills, or the owner of any interest therein, shall have the privilege of paying such tax bills in full at any time by paying all interest thereon to a period ninety days after the date of such payment, unless such payment is made within less than ninety days of the maturity of the next installment, and then by paying interest thereon to the date when the next installment becomes due and payable. Such tax bills, including each installment thereof, if not paid in full before the expiration of thirty days from the date of the issue thereof, shall bear interest from the date of issue at the rate of seven per cent per annum, and when any installment becomes due and collectible, as herein provided, interest thereon and on all unpaid installments shall be due and collectible to that date. If any installment of any such tax-bills or interest thereon be not paid when due, then all the remaining installments shall immediately become due and collectible, together with interest thereon at the rate of ten per cent per annum from the date of issue of such tax-bills, less the sum of any interest that may have already been paid on said installments. Suits may be brought to enforce the payment of such tax-bills or any installment or installments thereof, with all interest thereon, in the manner herein provided for the bringing of suits on other tax-bills; provided, however, that the owner or owners of any tract or parcel of real estate charged with the payment of such tax-bills, or the owner or owners of any interest in such tract or parcel of real estate shall, within sixty days from the date of issue of the tax-bills, file with the board of public works a written statement of each and all objections which he or they may have to the validity of such tax-bills, the doing of the work, the furnishing of the materials charged for, the sufficiency of the work or materials therein used and any mistake or error in the amount thereof; and in any suit on any tax-bill issued pursuant to this section, no objection or objections to it shall be pleaded or proved other than those that have been filed with the board of public works within the period aforesaid. The lien of all tax-bills issued under this section shall continue for a period of one year after the last installment specified therein shall have become due and payable and no longer, unless within such year suit shall have been instituted to collect such tax-bill, and notice of the bringing of such suit shall have been filed with the city treasurer, in which case the lien of such tax-bill shall continue until the termination of such suit and until the sale of the property under execution on the judgment establishing the same, and no default in the payment of any previous installment shall operate to diminish the period during which such lien shall continue. Such tax-bills and liens thereof shall be assignable and shall be of the same force and effect, and suits may be brought thereon in the same manner as other tax-bills issued by this city, and all other provisions relating to special tax-bills isued pursuant to the authority given in this article shall apply to those issued under this section, excepting so far only as the other provisions of this article conflict with those contained in this section.

Sec. 24. *Tax-bills, Notice of issuing.*—The board of public works shall publish for three successive days, Sundays excepted, in the newspaper at the time doing the city printing, the notice of the issue of any and all tax-bills authorized to be issued pursuant to this charter; but a failure so to do shall not affect the validity of any tax-bill.

Art. 17—Sec. 12. *Public improvements—Contracts—Lowest and best bidder—Repair by day's work.*—All city improvements of whatever kind or character, including the erection of all public buildings, made or to be erected at the expense of the city, and including all work to be paid for in special tax-bills, except as in this charter otherwise provided, shall be let by contract to the lowest and best bidder as shall be prescribed by ordinance; provided, however, that nothing in this section shall be so construed as to prevent repair by day's work of streets, alleys and other public places, curbing, sewers, culverts, buildings or other city property, so far as may be necessary, under the direction of the board of public works.

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Supreme Court of the United States.

No. 498.—October Term, 1900.

Margaret French and others, Plaintiffs in Error, } In error to the Supreme
vs. } Court of the State of
The Barber Asphalt Paving Company. } Missouri.

[April 29, 1901.]

This was a suit instituted in the circuit court of Jackson County, Missouri, by the Barber Asphalt Paving Company, a corporation whose business it was to construct pavements composed of asphalt, against Margaret French and others, owners of lots abutting on Forest avenue in Kansas City, for the purpose of enforcing the lien of a tax bill issued by that city in part payment of the cost of paving said avenue.

The work was done conformably to the requirements of the Kansas City charter, by the adoption of a resolution by the common council of the city declaring the work of paving the street, and with a pavement of a defined character, to be necessary, which resolution was first recommended by the board of public works of the city. This resolution was thereupon published for ten days in the newspaper doing the city printing. Thereafter the owners of a *majority* of front feet on that part of the street to be improved had the right, under the charter, within thirty days after the first day of the publication of the resolution, to file a remonstrance with the city clerk against the proposed improvement, and thereby to divest the common council of the power to make the improvement, and such property owners had the right, by filing within the same period a petition so to do, to have such street improved with a different kind of material or in a different manner from that specified in such resolution. In this instance neither such a remonstrance nor petition was filed, and the common council, upon the recommendation of the board of public works, enacted an ordinance requiring the construction of the pavement. The charter requires that a contract for such work shall be let to the lowest and best bidder. Thereupon bids for the work were duly advertised for, and the plaintiff company, being the lowest and best bidder therefor, a contract was, on July 31, 1894, entered into between Kansas City and the plaintiff for the construction of said pavement.

The contract expressly provided that the work should be paid for by the issuance of special tax bills, according to the provisions of the Kansas City charter, and that the city should not in any event be liable for or on account of the work. The cost of the pavement was apportioned and

charged against the lots fronting thereon according to the method
scribed by the charter, which is that the total cost of the work sha
apportioned and charged against the lands abutting thereon accordi
the frontage of the several lots or tracts of land abutting on the imp
ment. The charge against each lot or tract of land was evidenced by
bill. The tax bill representing the assessment against each lot was, b
charter, made a lien upon the tract of land against which it was issued
was *prima facie* evidence of the validity of the charge represented l
Such lien can be enforced only by suit in a court of competent jurisdic
against the owners of the land charged. No personal judgment was au
ized to be rendered against the owner of the land. The right was expr
conferred on the owner of reducing the amount of the recovery by pl
ing and proving any mistake or error in the amount of the bill, or
the work was not done in a good and workmanlike manner.

The defendants pleaded and contended that the contract offered in
dence was a contract to construct the pavement and maintain and
the street in repair for five years, and was contrary to the charter of
sas City, void and of no effect; and that the charter of Kansas City
ports to authorize the paving of streets and to authorize special tax
therefor, charging the cost thereof on the abutting property accordin
the frontage, without reference to any benefits to the property on w
the charge was made and the special tax bills levied, and that such me
of apportioning and charging the cost of the pavement was contrary to
in violation of the Fourteenth Amendment to the Constitution of
United States.

The judgment of the circuit court of Jackson County was for the pl
tiff company for the amount due on the tax bill and for the enforcen
of the lien. From this judgment an appeal was taken to the Supr
Court of Missouri, and, on November 13, 1900, the judgment of the
cuit Court was affirmed, and thereupon a writ of error from this court
allowed.

Mr. Justice SHIRAS delivered the opinion of the Court.

In its opinion in this case the Supreme Court of Missouri said that
method adopted in the charter and ordinance of Kansas City of char
the cost of paving Forest avenue against the adjoining lots accordin
their frontage had been repeatedly authorized by the legislature of
souri, and such laws had received the sanction of this court in m
decisions. (*St. Louis* v. *Allen*, 53 Mo. 44; *St. Joseph* v. *Anthony*, 30
538; *Neenan* v. *Smith*, 50 Mo. 258; *Kiley* v. *Cranor*, 57 Mo. 541; *Rut*
ford v. *Hamilton*, 97 Mo. 543; *Moberly* v. *Hogan*, 131 Mo. 19; *Farre*
St. Louis, 80 Mo. 379.)"

In the last-mentioned case Judge Norton for the court said:

> "The liability of lots fronting on a street, the paving of which is authorized to be charged with the cost of the work according to their frontage, having been thus so repeatedly asserted, the question is no longer an open one in this State, and we are relieved from the necessity of examining authorities cited by the counsel for plaintiff in error condemning what is familarily known as the foot-front rule.
>
> "Learned counsel for defendant concede such was the decided law of this State, and that the portion of the Kansas City charter known as the ninth article of the charter, which authorizes the cost of a pavement to be assessed against the lots now fronting on the improvement according to their respective frontage, was framed after this court had fully considered and construed similar laws and sustained them against the charge of unconstitutionality, and the assessment now challenged was made under the construction given by this court."

Accordingly the Supreme Court of Missouri held that the assessment in question was valid, and the tax imposed collectible. And, in so far as tho constitution and laws of Missouri are concerned, this court is, of course, bound by that decision.

But that court also held, against the contention of the lot owners, that the provisions of the Fourteenth Amendment to the Constitution of the United States were not applicable in the case; and our jurisdiction enables us to inquire whether the Supreme Court of Missouri were in error in so holding.

The question thus raised has been so often and so carefully discussed, both in the decisions of this court and of the State courts, that we do not deem it necessary to again enter upon a consideration of the nature and extent of the taxing power, nor to attempt to discover and define the limitations upon that power that may be found in constitutional principles. It will be sufficient for our present purpose to collate our previous decisions and to apply the conclusions reached therein to the present case.

It may prevent confusion, and relieve from repetition, if we point out that some of our cases arose under the provisions of the Fifth and others under those of the Fourteenth Amendment to the Constitution of the United States. While the language of those amendments is the same, yet as they were engrafted upon the Constitution at different times and in widely different circumstances of our national life, it may be that questions may arise in which different constructions and applications of their provisions may be proper. (*Slaughter-house Cases*, 16 Wall. 36, 77, 80.)

Thus it was said, in *Davidson* v. *New Orleans*, (96 U. S. 97–103):

> "It is not a little remarkable that while this provision has been in the Constitution of the United States, as a restraint upon the authority of the Federal government, for nearly a century, and while, during all that time, the manner in which the powers of that government have been exercised has been watched with jealousy, and subjected to the most rigid criticism in

all its branches, this special limitation upon its powers has rarely been i voked in the judicial forum or the more enlarged theatre of public discu sion. But while it has been a part of the Constitution, as a restrai upon the power of the States, only a very few years, the docket of th court is crowded with cases in which we are asked to hold that Sta courts and State legislatures have deprived their own citizens of li liberty or property without due process of law. There is here abunda evidence that there exists some strange misconception of the scope of th provision as found in the Fourteenth Amendment. In fact, it would see from the character of many of the cases before us, and the argumen made in them that the clause under consideration is looked upon as means of bringing to the test of the decision of this court the abstra opinion of every unsuccessful litigant in a State court of the justice the decision against him, and of the merits of the legislation in whi such a decision may be founded."

However, we shall not attempt to define what it is for a State to depri a person of life, liberty or property without due process of law, in term which would cover every exercise of power thus forbidden to the Stat and exclude those which are not, but shall proceed, in the present ca on the assumption that the legal import of the phrase "due process of law is the same in both amendments. Certainly, it cannot be supposed tha by the Fourteenth Amendment, it was intended to impose on the State when exercising their powers of taxation, any more rigid or stricter cur than that imposed on the Federal government, in a similar exercise power, by the Fifth Amendment.

Let us, then, inquire, as briefly as possible, what has been decided b this court as to the scope and effect of the phrase "due process of law," a applied to legislative power.

One of the earliest cases, in which was examined the historical an legal meaning of those words, is *Murray's Lessee* v. *Hoboken Land Com pany*, (18 How. 272.) The question involved was the validity of a sal of real estate made under a distress warrant, authorized by a statute the United States, (3 Stat. 592,) against a defaulting collector of custom It was contended that such a proceeding deprived the owner of propert without due process of law, contrary to the Fifth Amendment, that b "process of law" was meant a charge, defense, judgment before and by legally constituted court. The question was thus stated by Mr. Justic Curtis:

"That the warrant now in question is legal process is not denied. I was issued in conformity with an act of Congress. But is it 'due proces of law?' The Constitution contains no description of those processes whic it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. It is manifest that it was not left to the legislative power to enact any process whic might be devised. The article is a restraint on the legislative as well a on the executive and judicial powers of the government, and cannot be s construed as to leave Congress free to make any process 'due process o law' by its mere will. To what principles, then, are we to resort to ascertain whether this process, enacted by Congress, is due process? To this the answer must be twofold. We must examine the Constitution itself, to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country."

Pursuing the lines of inquiry thus indicated, the court reached the conclusions that, in ascertaining and enforcing payment of taxes and of balances due from receivers of the revenue in England, the methods have varied widely from the usual course of the common law on other subjects, and that, as respects such debts, the "law of the land" authorized the employment of auditors, and an inquisition without notice, and a species of examination bearing a very close resemblance to the warrant of distress in the act of Congress in question; that this diversity in the law of the land between revenue defaulters and ordinary debtors was understood in this country, and entered into the legislation of the colonies and provinces, and more especially of the States, after the Declaration of Independence and before the formation of the Constitution of the United States; that not only was the process of distress in nearly or quite universal use for the collection of taxes, but what was generally termed a warrant of distress, running against the body, goods and chattels of defaulting receivers of public money, was issued to some public officer, to whom was committed the power to ascertain the amount of the default, and by such warrant proceed to collect it; and that, accordingly, the distress warrant in question was not inconsistent with that part of the Constitution which prohibits a citizen from being deprived of his property without due process of law.

In *Walker* v. *Sauvinet*, (92 U. S. 90,) there was presented the question whether the Fourteenth Amendment availed to secure to a citizen of Louisiana a right of trial by jury as against an act of that State which provided that, in certain circumstances, a case enforcing penalties should be tried by the judge; and it was held that "the States, so far as this amendment is concerned, are left to regulate trials in their own courts in their own way. A trial by jury in suits of common law pending in the State courts is not, therefore, a privilege or immunity of national citizenship which the States are forbidden by the Fourteenth Amendment to abridge. A State cannot deprive a person of his property without due process of law, but this does not necessarily imply that all trials in the State courts affecting the property of persons must be by jury. This requirement of the Constitution is met if the trial is had according to the settled course of judicial proceedings. (*Murray's Lessee* v. *Hoboken Land*

Co., 18 How. 280.) Due process of law is process according to the law of the land. This process in the States is regulated by the law of the State. Our power over that law is only to determine whether it is in conflict with the supreme law of the land—that is to say, with the Constitution and laws of the United States made in pursuance therefor—or with any treaty made under the authority of the United States. Here the State court has decided that the proceeding below was in accordance with the law of the State; and we do not find that to be contrary to the Constitution or any law or treaty of the United States."

McMillen v. *Anderson*, (95 U. S. 37, 41,) was a case wherein was involved the validity of a law of the State of Louisiana, whereby a tax collector was authorized to seize property and sell it in order to enforce payment of a license tax, and which was alleged to be opposed to the provision of the Fourteenth Amendment of the Constitution which declares that no State shall deprive any person of life, liberty or property without due process of law; but it was said by this court:

> "Looking at the Louisiana statute here assailed, we feel bound to say that if it is void on the ground assumed the revenue laws of nearly all the States will be found void for the same reason. The mode of assessing taxes in the States, by the Federal government, and by all governments, is necessarily summary, that it may be speedy and effectual. By summary is not meant arbitrary, or unequal, or illegal. It must, under our Constitution, be lawfully done. But that does not mean, nor does the phrase 'due process of law' mean, by a judicial proceeding. The nation from whom we inherit the phrase 'due process of law' has never relied upon courts of justice for the collection of her taxes, though she passed through a successful revolution in resistance to unlawful taxation. We need not here go into the literature of that constitutional provision, because in any view that can be taken of it the statute under consideration does not violate it. It enacts that, when any person shall refuse or fail to pay his license tax, the collector shall give ten days' notice to the delinquent requiring its payment, and the manner of giving this notice is fully prescribed. If at the expiration of this time the license be not fully paid, the tax collector may, without judicial formality, proceed to seize and sell, after ten days' advertisement, the property of the delinquent or so much as may be necessary to pay the tax and costs. . . . Here is a notice that the party is assessed, by the proper officer, for a given sum as a tax of a certain kind, and ten days' time given him to pay it. Is not this a legal mode of proceeding? It seems to be supposed that it is essential to the validity of this tax that the party charged should have been present, or had an opportunity to be present, in some tribunal when he was assessed. But this is not, and never has been, considered necessary to the validity of a tax. And the fact that most of the States now have boards of revisors of tax assessments does not prove that taxes levied without them are void."

Davidson v. *New Orleans*, (96 U. S. 97,) was a case wherein an assessment of certain real estate in New Orleans for draining the swamps of that city was resisted in the State courts, and was by writ of error brought to this court on the ground that the proceeding deprived the owner of his property without due process of law. The origin and history of this provision of the Constitution, as found in Magna Charta, and in the Fifth and Fourteenth Amendments to the Constitution, were again considered; the cases of *Murray's Lessee* v. *Hoboken Land Co.*, (18 How. 272,) and *McMillen* v. *Anderson*, (95 U. S. 37,) were cited and approved; and it was held that "neither the corporate agency by which the work was done, the excessive price which the statute allowed therefor, nor the relative importance of the work to the value of the land assessed, nor the fact that the assessment was made before the work was done, nor that the assessment is unequal as regards the benefits conferred, nor that personal judgments were rendered for the amount assessed, were matters in which the State authorities are controlled by the Federal Constitution."

In *Springer* v. *United States*, (102 U. S. 586,) was involved the validity of an act of Congress, June 30, 1864, (13 Stat. 218,) whereby lands of A were distrained and sold by reason of his refusal to pay a tax assessed against him, and it was contended that the sale of defendant's real estate, to satisfy the tax assessed upon him, in a summary manner, without first having obtained a judgment in a court of law, was a proceeding to deprive the defendant of his property without due process of law; that by "due process of law" is meant law in its regular course of administration by the courts of justice, and not the execution of a power vested in ministerial officers. But this court, after citing *Murray's Lessee* v. *Hoboken Land Co.*, as holding that an act of Congress authorizing a warrant to issue, without oath, against a public debtor, for the seizure of his property, was valid, and that the proceeding was "due process of law," said:

> "The prompt payment of taxes is alway important to the public welfare. It may be vital to the existence of a government. The idea that every taxpayer is entitled to the delays of litigation is unreasonable. If the laws here in question involved any wrong or unnecessary harshness, it was for Congress, or the people who make congresses, to see that the evil was corrected. The remedy does not lie with the judicial branch of the government."

In *Missouri* v. *Lewis*, (101 U. S. 22,) the Fourteenth Amendment was invoked to invalidate legislation of the State of Missouri, regulating the right of appeal and of writs of error, and whereby suitors in the courts of St. Louis and certain other named counties were denied the right of appeal to the Supreme Court of Missouri in cases where it gave that right to suitors in the courts of the other counties of the State. Speaking for the court, Mr. Justice Bradley said:

> "If this position is correct, the Fourteenth Amendment has a much more far-reaching effect than has been supposed. It would render invalid all limitations of jurisdiction based on the amount or character of the demand. A party having a claim for only five dollars could with equal propriety complain that he is deprived of a right enjoyed by other citizens,

because he cannot prosecute it in the superior courts; and another might equally complain that he cannot bring a suit for real estate in a justice's court, where the expense is small and the proceedings are expeditious. There is no difference in principle between such discriminations as these in the jurisdiction of courts and that which the plaintiff in error complains of in the present case.

"If, however, we take into view the general objects and purposes of the Fourteenth Amendment, we shall find no reasonable ground for giving it any such application. These are to extend United States citizenship to all natives and naturalized persons, and to prohibit the States from abridging their privileges and immunities, and from depriving any person of life, liberty or property without due process of law, and from denying to any person within their jurisdiction the equal protection of the laws. It contemplates persons and classes of persons. It has not respect to local and municipal regulations that do not injuriously affect or discriminate between persons and classes of persons within the places or municipalities for which such regulations are made. The amendment could never have been intended to prevent a State from arranging and parcelling out the jurisdiction of its several courts at its discretion. . . . Each State has the right to make political subdivisions of its territory for municipal purposes, and to regulate their local government. . . . If every person residing or being in either portion of the State should be accorded the equal protection of the laws prevailing there, he could not justly complain of a violation of the clause referred to. For, as before said, it has respect to persons and classes of persons. It means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and in like circumstances. The Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two States separated only by an imaginary line."

In *Mattingly* v. *District of Columbia*, (97 U. S. 687, 692,) there was called in question the validity of the act of Congress of June 19, 1878, (20 Stat. 166,) entitled "An act to provide for the revision and correction of assessments for special improvements in the District of Columbia and for other purposes," and it was said by this court, through Mr. Justice Strong: "It may be that the burden laid upon the property of the complainants is onerous. Special assessments for special or street improvements very often are oppressive. But that the legislative power may authorize them, and may direct them to be made in proportion to the frontage, area or market value of the adjoining property, at its discretion, is, under the decisions, no longer an open question."

In *Kelly* v. *Pittsburgh*, (104 U. S. 78,) it was urged that land which the owner had not laid off into town lots, but occupied for agricultural purposes, and through which no streets are run or used, cannot be, even by the legislature, subjected to the taxes of a city—the water tax, the gas tax, the street tax and others of similar character. The reason for this was said to be that such taxes are for the benefit of those in a city who own property within the limits of such improvements, and who use or might use them if they choose, while he reaps no such benefit. Cases were cited from the higher courts of Kentucky and Iowa where this principle was asserted, and where those courts have held that farm lands in the city are not subject to the ordinary city taxes. But this court said:

"It is no part of our duty to inquire into the grounds on which those courts have so decided. They are questions which arise between the citizens of those States and their own city authorities, and afford no rule for construing the Constitution of the United States. . . . The main argument for the plaintiff in error—the only one to which we can listen—is that the proceeding in regard to the taxes assessed on his land deprives him of his property without due process of law.

"It is not asserted that, in the methods by which the value of his land was ascertained for the purpose of this taxation, there was any departure from the usual modes of assessment, nor that the manner of apportioning and collecting the tax was unusual or materially different from that in force in all communities where land is subject to taxation. In these respects there is no charge that the method pursued is not due process of law. Taxes have not, as a general rule, in this country since its independence, nor in England before that time, been collected by regular judicial proceedings. The necessities of government, the nature of the duty to be performed, and the customary usages of the people, have established a different procedure, which, in that matter, is and always has been due process of law. The tax in question was assessed and the proper officers were proceeding to collect it in this way. The distinct ground on which this provision of the Constitution of the United States is invoked is that as the land in question is, and always has been, used as farm land, for agricultural purposes only, subjecting it to taxation for ordinary city purposes deprives the plaintiff in error of his property without due process of law. It is alleged, and probably with truth, that the estimate of the value of the land for taxation is very greatly in excess of its true value. Whether this be true or not we cannot here inquire. We have so often decided that we cannot review and correct the errors and mistakes of the State tribunals on that subject, that it is only necessary to refer to those decisions, without a restatement of the argument on which they rest. (*State Railroad Tax Cases*, 92 U. S. 575; *Kenniard* v. *Louisiana*, 92 U. S. 480; *Davidson* v. *New Orleans*, 96 U. S. 97; *Kirtland* v. *Hotchkiss*, 100 U. S. 491; *Missouri* v. *Lewis*, 101 U. S. 22; *National Bank* v. *Kimball*, 103 U. S. 732.)"

In *Spencer* v. *Merchant*, (125 U. S. 345,) a judgment of the Court of Appeals of the State of New York, upholding the validity of an assessment upon lands to cover the expense of a local improvement, was brought to this court for review upon the allegation that the State statute was unconstitutional. In the opinion of this court, delivered by Mr. Justice Gray, the following extract was given from the opinion of the Court of Appeals:

"The act of 1881 determines absolutely and conclusively the amount of the tax to be raised, and the property to be assessed and upon which it is to be apportioned. Each of these things was within the power of the legislature, whose action cannot be reviewed in the courts upon the ground that it acted unjustly or without appropriate and adequate reason. The legislature may commit the ascertainment of the sum to be raised and of the benefited district to commissioners, but it is not bound to do so, and may settle both questions for itself; and when it does so, its action is necessarily conclusive and beyond review. Here an improvement has been ordered and made, the expense of which might justly have been imposed upon adjacent property benefited by the change. By the act of 1881 the legislature imposes the unpaid portion of the cost and expense, with the interest thereon, upon that portion of the property benefited which has thus far borne none of the burden. In so doing, it necessarily determines two things, viz., the amount to be realized, and the property especially benefited by the expenditure of the amount. The lands might have been benefited by the improvement, and so the legislative determination that they were, and to what amount or proportion of the cost, even if it may have been mistakingly unjust, is not open to our review. The question of special benefit and the property to which it extends is of necessity a question of fact, and when the legislature determines it in a case within its general power, its decision must of course be final. We can see in the determination reached possible sources of error and perhaps even of injustice, but we are not at liberty to say that the tax on the property covered by the law of 1881 was imposed without reference to special benefits. The legislature practically determines that the lands described in that act were peculiarly benefited by the improvement to a certain specified amount which constituted a just proportion of the whole cost and expense; and while it may be that the process by which the result was reached was not the best attainable, and some other might have been more accurate and just, we cannot for that reason question an enactment within the general legislative power. . . . The precise wrong of which complaint is made appears to be that the land owners now assessed never had an opportunity to be heard as to the original apportionment, and find themselves now practically bound by it as between their lots and those of the owners who paid. But that objection becomes a criticism upon the action of the legislature and the process by which it determined the amount to be raised and the property to be assessed. Unless by special permission, that is a hearing never granted in the process of taxation. The legislature determines expenditures and amounts to be raised for their payment, the whole discussion and all questions of prudence and propriety and justice being confided to its jurisdiction. It may err, but courts cannot review its discretion. In this case, it kept within its power when it fixed, first, the amount to be raised to discharge the improvement debt incurred by its direction; and, second, when it designated the lots and property, which in its judgment, by reason of special benefits, should bear the burden; and having the power, we cannot criticise the reasons or manner of its action."

This definition of legislative power was approved by this court, and the judgment of the Court of Appeals was affirmed. The following extract is from the opinion of this court:

"In the absence of any more specific constitutional restriction than the general prohibition against taking property without due process of law, the legislature of the State having the power to fix the same neces-

> ry to be levied for the expense of a public improvement, and to order it be assessed, either, like other taxes, upon property generally, or only pon the lands benefited by the improvement, is authorized to determine oth the amount of the whole tax, and the class of lands which will eceive the benefit and should therefore bear the burden, although it may, f it sees fit, commit the ascertainment of either or both of these facts to he judgment of commissioners. When the determination of the lands to e benefited is entrusted to commissioners, the owners may be entitled to otice and hearing upon the question whether their lands are benefited nd how much. But the legislature has the power to determine, by the tatute imposing the tax, what lands, which might be benefited by he improvement, are in fact benefited; and if it does so, its determination is conclusive upon the owners and the courts, and the owners have no right to be heard upon the question whether their lands are benefited or not, but only upon the validity of the assessment, and its apportionment among the different parcels of the class which the legislature has conclusively determined to be benefited. In determining what lands are benefited by the improvement, the legislature may avail itself of such information as it deems sufficient, either through investigations by its committees, or by adopting as its own the estimates or conclusions of others, whether those estimates or conclusions previously had or had not any legal sanction."

In *Paulsen* v. *Portland*, (149 U. S. 30, 40,) where the validity of a city ordinance, providing that the cost of a sewer should be distributed upon the property within the sewer district, and appointing viewers to estimate the proportionate share which each piece of property should bear, was questioned, because the ordinance contained no provision for notice, it was held by the Supreme Court of Oregon, and by this court on error, that notice by publication is a sufficient notice in proceedings of this nature, and that as the viewers, upon their appointment, gave notice by publication in the official paper of the city of the time and place of their first meeting, such notice was sufficient to bring the proceedings within "due process of law."

In *Fallbrook Irrigation District* v. *Bradley*, (164 U. S. 112) was involved the validity of the irrigation act enacted by the legislature of the State of California. One of the objections urged against the act was that it permitted the whole cost to be levied by a board of directors of the district upon all of the real estate of the district according to value, with no reference to the degree of benefit conferred. As to this it was said by this court, through Mr. Justice Peckham:

> "Assuming for the purpose of this objection that the owner of these lands had by the provisions of the act, and before the lands were finally included in the district, an opportunity to be heard before a proper tribunal upon the question of benefits, we are of opinion that the decisions of such a tribunal, in the absence of actual fraud and bad faith, would be, so far as this court is concerned, conclusive upon that question. It cannot be that upon a question of fact of such a nature this court has the power to

review the decision of the State court which has been pronounced under a statute providing for a hearing upon notice. The erroneous decision of such a question of fact violates no constitutional provision." Citing *Spencer* v. *Marchant*, (125 U. S. 345.)

Another objection to the validity of the act was the total want of an opportunity to be heard on the question of the expediency of forming the district, on the questions of cost and of benefits received. In respect to this it was said:

"The provision for a hearing in the irrigation act with a condition that lands which in the judgment of the board are not benefited shall not be included, renders the determination of the board, including them after a hearing, a judgment that such lands will be benefited by the proposed plan of irrigation.

"The publication of a notice of the proposed presentation of the petition is a sufficient notification to those interested in the question and gives them an opportunity to be heard before the board. (*Hager* v. *Reclamation District*, 111 U. S. 701; *Lent* v. *Tillson*, 140 U. S. 316; *Paulsen* v. *Portland*, 149 U. S. 30.)"

"It has been held in this court that the legislature has power to fix such a district for itself without any hearing as to benefits, for the purpose of assessing upon the lands within the district the cost of a local, public improvement. The legislature, when it fixes the district itself, is supposed to have made proper enquiry, and to have finally and conclusively determined the fact of benefits to the land included in the district, and the citizen has no constitutional right to any other or further hearing upon that question. The right which he thereafter has is to a hearing upon the question of what is termed the apportionment of the tax, *i. e.*, the amount of the tax which he is to pay. (*Paulsen* v. *Portland*, 149 U. S. 30, 41.) But when as in this case the determination of the question of what lands shall be included in the district is only to be decided after a decision as to what lands described in the petition will be benefited, and the decision of that question is submitted to some tribunal, (the board of supervisors in this case,) the parties whose lands are thus included in the petition are entitled to a hearing upon the question of benefits, and to have the lands excluded if the judgment of the board be against their being benefited.

"Unless the legislature decide the question of benefits itself, the land owner has the right to be heard upon that question before his property can be taken. This, in substance, was determined by the decisions of this court in *Spencer* v. *Marchant*, (125 U. S. 356,) and *Walston* v. *Nevin*, (128 U. S. 578.)"

In *Bauman* v. *Ross*, (167 U. S. 548,) on appeal from the Court of Appeals of the District of Columbia, it was held that Congress may direct that, when part of a parcel of land is appropriated to the public use for a highway in the District of Columbia, the tribunal vested by law with the duty of assessing the compensation or damages due to the owner, whether for the value of the part taken, or for any injury to the rest, shall take into consideration, by way of lessening the whole or either part of the sum due him, any special and direct benefits, capable of present estimate and reasonable computation, caused by the establishment of the highway to the part not taken; that the estimate of the just compensation for property taken for the public use, under the right of eminent domain, is not required to be made by a jury, but may be entrusted to commissioners appointed by a court, or to an inquest consisting of more or fewer men than an ordinary jury; that Congress, in the exercise of the right of taxation in the District of Columbia, may direct that half of the amount of the compensation or damages awarded to the owners of lands appropriated to the public use for a highway shall be assessed and charged upon the District of Columbia, and the other half upon the lands benefited thereby within the District, in proportion to the benefit; and may commit the ascertainment of the lands to be assessed, and the apportionment of the benefits among them, to the same tribunal which assesses the compensation or damages; that if the legislature, in taxing lands benefited by a highway, or other public improvement, makes provision for notice, by publication or otherwise, to each owner of land, and for hearing him, at some stage of the proceedings, upon the question what proportion of the tax shall be assessed upon his land, his property is not taken without due process of law.

In the opinion of the court in that case, delivered by Mr. Justice Gray, it was said that the provisions of the statute under consideration, which regulated the assessment of damages, are to be referred, not to the right of eminent domain, but to the right of taxation, and that the legislature, in the exercise of the right of taxation, has the authority to direct the whole, or such part as it may prescribe, of the expense of a public improvement, such as the establishing, the widening, the grading or the repair of a street, to be assessed upon the owners of lands benefited thereby; and that such authority has been repeatedly exercised in the District of Columbia by Congress, with the sanction of this court—citing *Willard* v. *Presbury*, (14 Wall. 676;) *Mattingly* v. *District of Columbia*, (97 U. S. 687;) *Shoemaker* v. *United States*, (147 U. S. 282, 302.) It was also said that the class of lands to be assessed for the purpose may be either determined by the legislature itself, by defining a territorial district, or by other designation; or it may be left by the legislature to the determination of commissioners, and be made to consist of such lands, and such only, as the commissioners shall decide to be benefited; that the rule of apportionment among the parcels of land benefited also rests within the discretion of the legislature, and may be directed to be in proportion to the position, the frontage, the area or the market value of the lands, or in proportion to the benefits as estimated by commissioners.

This subject has been recently considered by this court in the case of *Parsons* v. *District of Columbia*, (170 U. S. 45,) and where it was held, after a review of the authorities, that the enactment by Congress that assessments levied for laying watermains in the District of Columbia should be at the rate of $1.25 per linear foot front against all lots or land abutting on the street, road or alley, in which a watermain shall be laid, was constitutional, and was conclusive alike of the necessity of the work and of its benefit as against abutting property.

We do not deem it necessary to extend this opinion by referring to the many cases in the State courts, in which the principles of the foregoing cases have been approved and applied. It will be sufficient to state the conclusions reached, after a review of the State decisions, by two text-writers of high authority for learning and accuracy:

> "The major part of the cost of a local work is sometimes collected by general tax, while a smaller portion is levied upon the estates specially benefited.
>
> "The major part is sometimes assessed on estates benefited, while the general public is taxed a smaller portion in consideration of a smaller participation in the benefits.
>
> "The whole cost in other cases is levied on lands in the immediate vicinity of the work.
>
> "In a constitutional point of view, either of these methods is admissible, and one may sometimes be just and another at other times. In other cases it may be deemed reasonable to make the whole cost a general charge, and levy no special assessment whatever. The question is legislative, and, like all legislative questions, may be decided erroneously; but it is reasonable to expect that, with such latitude of choice, the tax will be more just and equal than it would be were the legislature required to levy it by one inflexible and arbitrary rule." (Cooley on Taxation, 447.)

> "The courts are very generally agreed that the authority to require the property specially benefited to bear the expense of local improvements is a branch of the taxing power, or included within it. . . . Whether the expense of making such improvements shall be paid out of the general treasury, or be assessed upon the abutting or other property specially benefited, and, if in the latter mode, whether the assessment shall be upon all property found to be benefited, or alone upon the abutters, according to frontage or according to the area of their lots, is according to the present weight of authority considered to be a question of legislative expediency." (Dillon's Municipal Corporations, vol. 2, § 752, 4th ed.)

This array of authority was confronted, in the courts below, with the decision of this court in the case of *Norwood* v. *Baker*, (172 U. S. 269,) which was claimed to overrule our previous cases, and to establish the principle that the cost of a local improvement cannot be assessed against abutting property according to frontage, unless the law, under which the improvement is made, provides for a preliminary hearing as to the benefits to be derived by the property to be assessed.

34052

But we agree with the Supreme Court of Missouri in its view that such is not the necessary legal import of the decision in *Norwood* v. *Baker*. That was a case where by a village ordinance, apparently aimed at a single person, a portion of whose property was condemned for a street, the entire cost of opening the street, including not only the full amount paid for the strip condemned, but the costs and expenses of the condemnation proceedings, was thrown upon the abutting property of the person whose land was condemned. This appeared, both to the court below and to a majority of the judges of this court, to be an abuse of the law, an act of confiscation, and not a valid exercise of the taxing power. This court, however, did not affirm the decree of the trial court awarding a perpetual injunction against the making and collection of any special assessments upon Mrs. Baker's property, but said:

> "It should be observed that the decree did not relieve the abutting property from liability for such amount as could be properly assessed against it. Its legal effect, as we now adjudge, was only to prevent the enforcement of the particular assessment in question. It left the village, in its discretion, to take such steps as were within its power to take, either under existing statutes or under any authority that might thereafter be conferred upon it, to make a new assessment upon the plaintiffs' abutting property for so much of the expense of the opening of the street as was found upon due and proper inquiry to be equal to the special benefits accruing to the property. By the decree rendered the court avoided the performance of functions appertaining to an assessing tribunal or body, and left the subject under the control of the local authorities designated by the State."

That this decision did not go to the extent claimed by the plaintiff in error in this case is evident, because in the opinion of the majority it is expressly said that the decision was not inconsistent with our decisions in *Parsons* v. *District of Columbia*, (170 U. S. 45, 56,) and in *Spencer* v. *Merchant*, (122 U. S. 345, 357.)

It may be conceded that courts of equity are always open to afford a remedy where there is an attempt, under the guise of legal proceedings, to deprive a person of his life, liberty or property, without due process of law. And such, in the opinion of a majority of the judges of this court, was the nature and effect of the proceedings in the case of *Norwood* v. *Baker*.

But there is no such a state of facts in the present case. Those facts are thus stated by the court of Missouri:

> "The work done consisted of paving with asphaltum the roadway of Forest avenue in Kansas City, thirty-six feet in width, from Independence avenue to Twelfth street, a distance of one-half a mile. Forest avenue is one of the oldest and best improved residence streets in the city, and all of the lots abutting thereon front the street and extend back therefrom uniformily to the depth of an ordinary city lot to an alley. The lots are

all improved and used for residence purposes, and all of the lots are substantially on the grade of the street as improved, and are similarily situated with respect to the asphalt pavement. The structure of the pavement along its entire extent is uniform in distance and quality. There is no showing that there is any difference in the value of any of the lots abutting on the improvement."

What was complained of was an orderly procedure under a scheme of local improvements prescribed by the legislature and approved by the courts of the State as consistent with constitutional principles.

The judgment of the Supreme Court of Missouri is

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.

Supreme Court of the United States.

No. 498.—October Term, 1900.

Margaret French and others, Plaintiff in Error, } In error to the Supreme
vs. } Court of the State of
The Barber Asphalt Paving Company. } Missouri.

[April 29th 1901.]

Mr. Justice Harlan (with whom concurred Mr. Justice White and Mr. Justice McKenna) dissenting.

The special tax bills here in question purport to cover the cost of paving with asphalt a part of Forest Avenue in Kansas City, Missouri. The work was done under the orders of the common council of that city, and the tax bills, it is alleged, were made out in conformity with the provisions of the city charter.

By section two of article nine of the city charter it was provided that "the city shall have power to cause to be graded, regraded, constructed, reconstructed, paved, repaved, blocked, reblocked, graveled, regraveled, macadamized, remacadamized, curbed, recurbed, guttered, reguttered, or otherwise improved or repaired, all streets, alleys, sidewalks, avenues, public highways and parts thereof, . . and to pay therefor out of the general fund *or by issuing special tax bills* as herein mentioned. . . ."

The same section provides that no resolution for the paving, repaving, &c., of any street, alley, avenue, public highway or part thereof "shall be passed by the common council except upon recommendation of the board of public works indorsed thereon; and provided further, that if the resident owners of the city who own a majority in front feet of all the lands belonging to such residents and fronting on the street, alley, avenue, public highway or part thereof to be improved shall, within thirty days after the first day of the publication of such resolution, file with the board of public works a petition, signed by them, to have such street, alley, avenue, public highway or part thereof paved, repaved, blocked, reblocked, graveled, regraveled, macadamized or remacadamized with a different kind of material or in a different manner from that specified in such resolution, then the ordinance providing for the doing of such work or making such improvement shall provide that the work shall be done in the manner and with the material specified in such petition, and in such case the ordinance need not be recommended by the board of public works as aforesaid. If the remonstrance of the resident property owners above mentioned shall be filed with the city clerk, as herein provided, then the power of the common council to make the proposed improvement and pay therefor in special tax bills shall cease until a sufficient number of persons so remonstrating or their grantees shall, in writing, withdraw their names, or the property represented by them, from such remonstrance, so that said remonstrance shall cease to represent a majority of the resident property owners as above provided, when the common council shall proceed in the manner above mentioned to cause the proposed improvement to be made." But by a subsequent section it was provided: "When it shall be proposed to pave, repave, block, reblock, gravel, regravel, macadamize or remacadamize any street, alley, avenue, public highway or part thereof *and pay therefor in special tax bills,* if the common council shall, by ordinance, find and declare that the resolution provided in section two of this article has been published as therein required and that the resident owners of the city who own a majority in front feet of all the lands belonging to such residents fronting on the street, alley, avenue, public highway or part thereof to be improved have not filed with the city clerk a remonstrance against the doing of such work or a petition for the making of such improvement with a different kind of material or in a different manner from that specified in such resolution, or that such petition was filed for the doing of the work as mentioned in said ordinance, such finding and declaration shall be conclusive for all purposes, and *no special tax bill* shall be held *invalid or affected* for the reason *that such resolution was not published as therein required*, or *that a remonstrance or petition sufficiently signed was filed as therein required*, or *that such petition was not filed or was insufficiently signed*." § 4.

By section three it was provided that "all ordinances and contracts for all work authorized to be done by section two of this article shall specify how the same is to be paid for, and in case payment is to be made in special tax bills, the city shall in no event nor in any manner whatever be liable for or on account of the work."

The cost of work done on sidewalks, streets, avenues, alleys and public highways is provided for in the fifth and sixth sections of the same article, as follows: "The cost of all work on any sidewalk, including curbing and guttering along the side thereof, exclusive of the grading of the same, shall be charged as a special tax upon the adjoining lands according to the frontage thereof on the sidewalk. The cost of all other work specified in the first three sections of this article on all streets, avenues, alleys and public highways, or parts thereof, *shall* be charged as a *special tax* on the land *on both sides of and adjoining* the street, avenue, alley or public highway, or parts thereof improved, according to the *frontage* thereof. . . When any work other than grading or regrading, as last aforesaid, shall be completed, and is to be paid for in special tax bills, the board of public works shall cause the

34054

city engineer to compute the cost thereof, and apportion the same among the several lots or parcels of land to be charged therewith, and charge each lot or parcel of land with its proper share of such cost according to the *frontage* of such land. The board of public works shall, after the cost of any work has been so apportioned for payment in special tax bills, except as hereinafter provided, make out and certify, in favor of the contractor or contractors to be paid, a special tax bill for the amount of the special tax, according to such apportionment, against each lot or parcel of land to be charged."

By section eighteen of the same article every *special tax bill* issued under its provisions is made "a *lien* upon the land described therein, upon the date of the receipt to the board of public works therefor, and such lien shall continue for two years thereafter."

It thus appears that under the charter of Kansas City the cost of the paving or the repaving of any street, avenue, alley or public highway, is put upon the abutting property under a *rule* absolutely excluding any consideration whatever of the question of special benefits accruing, by reason of the work done, to such property. It is true the abutting owner, in defense of a suit brought on a special tax bill, may show any mistake or error in the amount of such bill, or that the work was not done in a workmanlike manner; but the cost, set forth in the tax bill, or when ascertained in a suit on the tax bill, *must* be borne by the abutting property, according to its *frontage*, even if such cost be in substantial excess of the special benefits, if any, accruing to the property assessed. So the abutting property *must* bear the cost, according to frontage, even *if such cost equals the full or actual market value of the land.* Thus, the entire property abutting on the street improved, and subjected by the statute, that is, by the city charter, to a lien in favor of the contractor or his assignee, may be taken from the owner, for the benefit of the general public, to meet the cost of improving a public highway in which the entire community is interested. But that circumstance, it is contended, is not of the slightest consequence; for—so the argument in support of the statute runs—the legislature having determined that the land abutting on a public street shall, according to its frontage, meet the cost, whatever it may be, of improving that street, the courts cannot inquire whether the owner has received any such special benefit as justifies the putting upon him of a special burden not shared by the general public for whose use the improvement was made, nor inquire whether the cost of the work equals or exceeds the value of the property. I cannot assent to this principle. It recognizes, contrary to the principles announced in *Norwood* v. *Baker*, 172 *U. S.* 269, 277, 279, 293, 297, the existence in the legislative branch of government of powers which, I take leave to say, cannot be exercised without violating the Constitution of the United States. In that case, upon the fullest consideration, it was held, as had been held in previous cases, that the due process of law prescribed by the Fourteenth Amendment requires compensation to be made or secured to the owner when private property is taken by a State or under its authority for public use. We also held that an assessment upon abutting property for the cost and expense incurred in opening a street was to be referred to the power of taxation, and that the Constitution of the United States forbade an exercise of that power that would put upon private property the cost of a public work in substantial excess of the special benefits accruing to it from such work. Let us see if that was not the decision of the court.

In that case the attempt was made to put upon the abutting property the entire cost incurred in opening a public street through the owner's lands. No inquiry as to special benefits was made; indeed, no inquiry of that character was permissible under the ordinance in virtue of which the street was opened. It was not denied that the ordinance was consistent with the statutes of the State; and the question was distinctly presented whether a special assessment for the cost of opening a street through private property could be sustained under the Constitution of the United States if it was made under a *rule* excluding all inquiry as to special benefits accruing to the abutting property by reason of such improvement. In that case it was the public and not the owner of the property that wished the street to be opened. The judgment of the Circuit Court enjoining the assessment was affirmed upon the ground—so our mandate expressly stated—that the assessment was "under a *rule* which *excluded* any inquiry as to special benefits, and the necessary operation of which was, *to the extent of the excess of the cost of opening the street in question over any special benefits accruing to the abutting property therefrom*, to take private property for public use without compensation." The mandate was in harmony with the opinion, for the court said: "It should be observed that the decree did not relieve the abutting property from liability for such amount as could be properly assessed against it. Its legal effect, as we now adjudge, was only to prevent the enforcement of the particular assessment in question. It left the village, in its discretion, to take such steps as were within its power to take, either under existing statutes, or under any authority that might thereafter be conferred upon it, to make a new assessment upon the plaintiff's abutting property for so much of the expense of opening the street as was found upon due and proper inquiry to be equal to the special benefits accruing to the property."

As the court in the present case makes some observations as to the scope of the decision in *Norwood* v. *Baker*, it will be well to ascertain the precise grounds upon which our judgment in that case was based. Those grounds are indicated by the following extracts from the opinion:

"Undoubtedly abutting owners may be subjected to *special assessments to meet the expenses of opening public highways in front of their property*—

such assessments, according to well-established principles, resting upon the ground *that special burdens may be imposed for special or peculiar benefits accruing from public improvements.* *Mobile County* v. *Kimball,* 102 *U. S.* 691, 703, 704; *Illinois Central Railroad* v. *Decatur,* 147 *U. S.* 190, 202; *Bauman* v. *Ross,* 167 *U. S.* 548, 589, *and authorities there cited.* And according to the weight of judicial authority, the legislature has a large discretion in defining the territory to be deemed specially benefited by a public improvement, and which may be subjected to special assessment to meet the cost of such improvement. In *Williams* v. *Eggleston,* 170 *U. S.* 304, 311, where the only question, as this court stated, was as to the power of the legislature to cast the burden of a public improvement upon certain towns *which had been judicially determined to be towns benefited by such improvement,* it was said: 'Neither can it be doubted that, if the State constitution does not prohibit, the legislature, speaking *generally,* may create a new taxing district, determine what territory shall belong to such district and what property shall be considered as benefited by a proposed improvement.' But the power of the legislature in these matters is not unlimited. There is a point beyond which the legislative department, even when exerting the power of taxation, may not go consistently with the citizen's right of property. As already indicated, the principle underlying special assessments to meet the cost of public improvements is that the property upon which they are imposed is peculiarly benefited, and therefore the owners do not, in fact, pay anything in excess of what they receive by reason of such improvement. But the guaranties for the protection of private property would be seriously impaired, if it were established as a rule of constitutional law, that the imposition by the legislature upon particular private property of the entire cost of a public improvement, irrespective of any peculiar benefits accruing to the owner from such improvement, could not be questioned by him in the courts of the country."

Again: "It is one thing for the legislature to prescribe as a *general* rule that property abutting on a street opened by the public shall be deemed to have been specially benefited by such improvement, and therefore should specially contribute to the cost incurred by the public. It is quite a different thing to lay it down as an absolute rule that such property, whether it is in fact benefited or not by the opening of the street, may be assessed by the front foot for a fixed sum representing the whole cost of the improvement, and without any right in the property owner to show, when an assessment of that kind is made or is about to be made, that the sum so fixed is in excess of the benefits received. In our judgment, the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, *to the extent of such excess,* a taking, under the guise of taxation, of private property for public use without compensation. We say 'substantial excess,' because exact equality of taxation is not always attainable, and for that reason the excess of cost over special benefits, unless it be of material character, ought not to be regarded by a court of equity when its aid is invoked to restrain the enforcement of a special assessment." Further, in the same case: "The decree does not prevent the village, if it has or obtains power to that end, from proceeding to make an assessment in conformity with the view indicated in this opinion, namely: That while abutting property may be specially assessed on account of the expense attending the opening of a public street in front of it, such assessment must be measured or limited by the special benefits accruing to it, that is, by benefits that are not shared by the general public; and that taxation of the abutting property for any substantial excess of such cost over special benefits will, to the extent of such excess, be a taking of private property for public use without compensation."

Does the court intend in this case to overrule the principles announced in *Norwood* v. *Baker?* Does it intend to reject as unsound the doctrine that "the principle underlying special assessments to meet the cost of public improvements is that the property upon which they are imposed is peculiarly benefited, and therefore the owners do not, in fact, pay anything in excess of what they receive by reason of such improvement?" Is it the purpose of the court, in this case, to overrule the doctrine that taxation of abutting property to meet the cost of a public improvement—such taxation being for an amount in substantial excess of the special benefits received—"will, *to the extent of such excess*, be a taking of private property for public use without compensation?" The opinion of the majority is so worded that I am not able to answer these questions with absolute confidence. It is difficult to tell just how far the court intends to go. But I am quite sure, from the intimations contained in the opinion, that it will be cited by some as resting upon the broad ground that a legislative determination as to the extent to which land abutting on a public street may be specially assessed for the cost of paving such street is conclusive upon the owner, and that he will not be heard, in a judicial tribunal or elsewhere, to complain even if, under the rule prescribed, the cost is in substantial excess of any special benefits accruing to his property, or even if such cost equals or exceeds the value of the property specially taxed. The reasons which, in my judgment, condemn such a doctrine as inconsistent with the Constitution are set forth in *Norwood* v. *Baker*, and need not be repeated. But I may add a reference to some recent adjudications.

In *Sears* v. *Boston*, 173 *Mass.* 71, 78, which was the case of a special assessment to meet the cost of watering streets, the court said: "It is now established by the highest judicial authority that such assessments cannot be so laid upon any estate as to be in substantial excess of the benefit received. The case of *Norwood* v. *Baker*, 172 *U. S.* 269, contains an elaborate discussion of the subject, with a citation of authorities from many of the States, and holds that a local assessment for an amount in substantial excess of the benefit received is in violation of the Fourteenth Amendment of the Constitution of the United States, inasmuch as it would deprive one of his property without compensation, and so without due process of law. The authority of this case is controlling in all State courts, and if it were not, *it is in accordance with sound principle*, and with the great weight of authority in other courts. The principles which have often been stated by this court lead to the same result. *Boston* v. *Boston & Albany Railroad*, 170 *Mass.* 95, 101, *and cases cited*." In *Sears* v. *Street Commissioners*, 173 *Mass*. 350, 352, which was the case of charges upon land to meet the cost of certain sewerage work done under municipal authority, Mr. Justice Knowlton, delivering the unanimous judgment of the court, said: "If we treat the determination of these charges as a local and special assessment upon particular estates, we have to consider the principles on which such taxation is founded. It is well established that taxation of this kind is permissible under the Constitution of this Commonwealth and under the Constitution of the United States *only* when founded upon special and peculiar benefits to the property from the expenditure on account of which the tax is laid, and then *only to an amount not exceeding such special and peculiar benefits*. . . The fact that the charges to be determined are for the construction, maintenance and operation of the sewerage works of the whole city, gives some force to the possibility of a construction which includes all benefits; but whether this construction should be adopted or not, the [illegible]ges may be determined on any grounds which the street commissioners deem just and proper, and may not be founded in any great degree, if at all, upon special and peculiar benefits, and may in any particular case largely exceed the benefits. This fact in itself is enough to bring the statute within the prohibition of the Constitution, inasmuch as it purports to authorize a taking of property to pay a charge which is not founded on a special benefit or equivalent received by the estate or its owner. Such a taking would be without due process of law"—citing *Norwood* v. *Baker*, 172 *U. S.* 269; *New Brunswick Rubber Co.* v. *Street Com'rs*, 9 *Vroom*, 190; *Barnes* v. *Dyer*, 56 *Vt.* 469, and *Thomas* v *Gain*, 35 *Mich.* 155. In *Dexter* v. *Boston*, 176 *Mass.* 247, 251, 252, the court said: "It is now settled law in this court, as it is in the Supreme Court of the United States, and in many other courts, that after the construction of a public improvement a local assessment for the cost of it cannot be laid upon real estate in substantial excess of the benefit received by the property. Such assessments must be founded on the benefits, and be proportioned to the benefits." To the same effect are *Hutchison* v. *Storrie*, 92 *Tex.* 688; *Adams* v. *City*, (*Ind.*) 57 *N. E. Rep.* 114; *McKee* v. *Town of Pendleton*, (*Ind.*) *Id.* 532; *Fay* v. *City of Springfield*, 94 *Fed. Rep.* 409; *Loeb* v. *Trustees*, 91 *Fed. Rep.* 37; *Charles* v. *City of Marion*, 98 *Fed. Rep.* 166; *Cowley* v. *City of Spokane*, 99 *Fed. Rep.* 840.

The court, after referring to the declaration of the Supreme Court of Missouri to the effect that the Fourteenth Amendment was not applicable to this case, proceeds, in order to "prevent confusion and relieve from repetition," to refer to some of the cases arising under that and the Fifth Amendment. In the same connection the court, referring to the Fifth and Fourteenth Amendments, says that "while the language of those Amendments is the same [in respect of the deprivation of property without due process of law], yet as they were engrafted upon the Constitution at different times and in widely different circumstances of our national life, it may be that questions may arise in which different constructions and applications of their provisions may be proper." As the court expressly declines to formulate any rule to determine for all cases "what it is for a State to deprive a person of life, liberty or property without due process of law," I will not enter upon a discussion of that question, but content myself with saying that the prohibition against the deprivation of property without due process of law cannot mean one thing under the Fifth Amendment and another thing under the Fourteenth Amendment, the words used being the same in each Amendment. If the the court intends to intimate the contrary in its opinion, I submit that the intimation is not sustained by any former decision, and is not justified by sound principle.

The first case to which the court refers as arising under the Fourteenth Amendment is *Davidson* v. *New Orleans*, 96 *U. S.* 97, 103–105. From that case sentences are quoted which were intended to remove the impression, then supposed to exist with some, that under that Amendment it was possible to bring "to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a State court of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded." But the court in the present case overlooks another part of the opinion in *Davidson* v. *New Orleans* which was pertinent to the issue in that case, and is pertinent to the present discussion. After speaking of the difficulty of an attempt to lay down any rule to determine the full scope of the Fourteenth Amendment, and suggesting that the wise course was to proceed by the gradual process of judicial inclusion and exclusion, the court said: "As contributing, to some extent, to this mode of determining what class of cases do not fall within its provision, we lay down the following proposition, as applicable to the case before us: That whenever by the laws of a State, or by State authority, a tax, assessment, servitude or other burden is imposed upon property for the public use, whether it be for the whole State or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections." Here is a direct affirmation of the doctrine that a tax, assessment, servitude or other burden may be imposed by a State, or under its authority, consistently with the due process of law prescribed by the Fourteenth Amendment, *if* the person owning the property upon which such tax, assessment, servitude or burden is imposed is given an opportunity, in some appropriate way, to contest the matter. In the present case, no such opportunity was given to the plaintiffs in error, and the State court held that they had no right to show, in any tribunal, that their property was being taken for the cost of improving a public street in substantial excess of any special benefits accruing to them beyond those accruing to the general public owning and using the street so improved.

Reference is made by the court to *McMillen* v. *Anderson*, 95 *U. S.* 38, 41, 42, in which will be found certain observations as to the words "due process of law." In that case the only question was whether a statute of Louisiana imposing a license tax, which did not give a person an opportuity to be present when the tax was assessed against him, or provide for its collection by suit, was in violation of the Fourteenth Amendment. The court, after referring to the provision requiring, in case the license tax was not paid, that the collector should give ten days' written or printed notice to the delinquent, and if at the expiration of that time the license was not fully paid, the tax collector might, without judicial formality, proceed to seize and sell, after ten days' advertisement, the property of the delinquent, or so much as might be necessary to pay the taxes and costs, said: "Another statute declares who is liable to this tax, and fixes the amount of it. The statute here complained of relates only to the manner of its collection. Here is a notice that the party is assessed, by the proper officer, for a given sum, as a tax of a certain kind, and ten days' time given him to pay it. Is not this a legal mode of proceeding? It seems to be supposed that it is essential to the validity of this tax that the party charged should have been present, or had an opportunity to be present, in some tribunal when he was assessed. But this is not, and never has been, considered necessary to the validity of a tax. And the fact that most of the States now have board of revisers of tax assessments does not prove that taxes levied without them are void. Nor is the person charged with such a tax without legal remedy by the laws of Louisiana. It is probable that in that State, as in others, if compelled to pay the tax by a levy upon his property, he can sue the proper party and recover back the money as paid under duress, if the tax was illegal. But however that may be, it is quite certain that he can, if he is wrongfully taxed, *stay the proceedings for its collection by process of injunction*. See *Fouqua's Code of Practice of Louisiana, arts.* 296–309, inclusive. *The act of* 1874 *recognizes this right to an injunction, and regulates the proceedings when issued to stay the col-*

lection of taxes. It declares that they shall be treated by the courts as preferred cases, and imposes a double tax upon a dissolution of the injunction." Here we have, contrary to the intimation given in the opinion of the court in this case, a recognition of the principle that the Fourteenth Amendment does apply to cases of taxation under the laws of a State. And it is to be observed that the court in *McMillen* v. *Anderson* takes care to show that, under the laws of Louisiana, the taxpayer was given an opportunity to be heard in respect of the validity of the tax imposed upon him.

Among the cases cited in support of the conclusions announced by the majority are *Mattingly* v. *District of Columbia,* 97 *U. S.* 687, 692; *Kelly* v. *Pittsburg,* 104 *U. S.* 78; *Spencer* v. *Merchant,* 125 *U. S.* 345; *Paulsen* v. *Portland,* 149 *U. S.* 30, 40; *Bauman* v. *Ross,* 167 *U. S.* 548, and *Parsons* v. *District of Columbia,* 170 *U. S.* 45.

It seems to me quite clear that the particular question before us was not involved or determined in any of those cases.

In *Mattingly* v. *District of Columbia,* it was said that the legislature may direct special assessments for special road or street improvements "to be made in proportion to the frontage, area or market value of the adjoining property, at its discretion." But that falls far short of deciding that an assessment in proportion to frontage could be sustained if it exceeded the value of the property or was for an amount in excess of the special benefits accruing to the property assessed. Besides, no question was made in that case as to the cost of the work exceeding special benefits.

In *Kelly* v. *Pittsburg,* the only point involved or adjudged was that the Fourteenth Amendment did not stand in the way of the legislature of a State extending the limits of a city or township so as to include lands fit for agricultural use only, and make them subject to taxation for the local purposes of the extended city or town, although the owners did not enjoy the advantages of the municipal government to the same extent as those who resided in the thickly settled parts of the city or town. It was not a case in which the property of particular persons was specially assessed by a rule not applicable to all other assessments. On the contrary it was admitted in that case that the methods adopted to ascertain the value for purposes of local taxation of the lands there in question were such as were usually employed, and that the manner of apportioning and collecting the tax was not unusual or materially different from that in force in all communities where land was subject to taxation. It was held that it was not the function of the court to correct mere errors in the valuation of lands for purposes of taxation.

In *Spencer* v. *Merchant* no question arose as to an excess of the cost of the improvement there in question over special benefits. The question before the court was as to the constitutionality of a statute validating what had been judically determined to be a void assessment. This court so declared when it said that the plaintiff, who questioned the validity of the statute, contended "that the statute of 1881 was unconstitutional and void, because it was an attempt by the legislature to validate a void assessment, without giving the owners of the lands assessed an opportunity to be heard upon *the whole amount of the assessment*." The court held that the statute itself was, under the circumstances of that case, all the notice and hearing the owners of the lands required. There was no occasion for any general declaration as to the powers of the legislature which would cover cases of void assessments validated by legislative enactment where the amount assessed upon particular property was in substantial excess of special benefits accruing to it. Referring to *Spencer* v. *Merchant*, this court said in *Norwood* v. *Baker*: "The point raised in that case—*the only point in judgment*—was one relating to proper notice to the owners of the property assessed, in order that they might be heard upon the question of the equitable apportionment of the sum directed to be levied upon all of them. This appears from both the opinion and the dissenting opinion in that case."

In *Paulsen* v. *Portland* the only point adjudged was that notice by publication in a newspaper of the time and place of the meeting of viewers appointed to estimate the proportionate share which each piece should bear of the amount to be assessed upon the property in a sewer district for the cost of a sewer, was sufficient "to bring the proceedings within due process of law." The court in that case took care to say that it did not question the proposition that "notice to the taxpayer in some form must be given before an assessment for the construction of a sewer can be sustained, as in any other demand upon the individual for a portion of his property." That case cannot be held to support the views of the Supreme Court of Missouri, for that court in this case held in substance that, under legislative authority, property fronting on a public street could all be taken to pay the cost of improving the street, leaving nothing whatever to the owner, and that too without any notice and without any right in the owner, in any form, to show that the amount required to be paid exceeded not only any special benefits accruing to the property but even the value of the property assessed.

In *Bauman* v. *Ross* we had a case in which a special assessment was made, under an act of Congress, imposing upon the lands benefited one-half of the amount awarded by the court as damages for each highway or reservation, or part thereof, condemned and established under the act. The assessment was directed to be "charged upon the lands benefited by the laying out and opening of such highway or reservation or part thereof," and the jury was directed "to ascertain and determine what property is thereby benefited." The same act directed the jury to assess against each parcel which it found to be so benefited its proportional part of the sum assessed, provided that as to any tract, part of which only had been been taken, due allowance should be made for the amount, if any, "which shall have been deducted from the value of the part taken on account of the benefit to the remainder of the tract." In such a case, the owner of the property being given full right to be heard before an authorized tribunal upon the question of special benefits, no question could arise such as is presented in the present one.

In *Parsons* v. *District of Columbia* the question was as to the validity of an act of Congress which provided for establishing, in this District, "a comprehensive system, regulating the supply of water and the erection and maintenance of reservoirs and water mains." It was provided that assessments levied for water mains should be at the rate of $1.25 per linear foot against all lots or land abutting upon the street, road or alley in which a water main is laid. This court, among other things, said: "Another complaint urged is that the assessment exceeded the actual cost of the work, and this is supposed to be shown by the fact that the expense of putting down this particular main was less than the amount raised by the assessment. But this objection overlooks the fact that the laying of this main was part of the *water system*, and that the assessment prescribed was not merely to put down the pipes, but to raise a fund to keep the system in efficient repair. The moneys raised beyond the expense of laying the pipe are not paid into the general treasury of the District, but are set aside *to maintain and repair the system*." But the court took care to add, "and there is no such disproportion between the amount assessed and the actual cost as to show any abuse of legislative power." The words thus added are significant, and if they had not been added the opinion would not have passed without dissent. The words referred to justify the conclusion that if there had been an abuse of legislative power; if the amount assessed had been substantially or materially in excess of the cost of the work or of the value of the property assessed, or of the special benefits received, the owners of the abutting property might justly have complained of a violation of their constitutional rights.

The court, in its opinion, quotes certain passages from Cooley's Treatise on Taxation, in which the author refers to the different modes in which the cost of local public work may be met, namely: (1) a general tax to cover the major part of the cost, the smaller portion to be levied upon the estates specially benefited; (2) a tax on the land specially benefited to meet the major part of the cost, the smaller part to be paid by the general public; and (3) a tax for the whole cost on the lands in the immediate vicinity of the work. In respect of each of these methods the court cites these words of Cooley: "In a constitutional point of view, either of these methods is admissible, and one may sometimes be just and another at other times. In other cases it may be deemed reasonable to make the whole cost a general charge, and levy no special assessment whatever. The question is legislative, and like all legislative questions, may be decided erroneously; but it is reasonable to expect that, with such latitude of choice, the tax will be more just and equal, than it would be were the legislature required to levy it by one inflexible and arbitrary rule." *Cooley on Taxation*, 447 *c.* 20, § 5; *Id. 2d ed.* 637, § 5.

But in the *same chapter* from which the above extract was made the author discusses fully the underlying principles of special assessments, saying: "Special assessments are a peculiar species of taxation, standing apart from the general burdens imposed for State and municipal purposes, and governed by principles that do not apply generally. The general levy of taxes is understoood to exact contributions in return for the general benefits of government, and it promises nothing to the persons taxed beyond what may be anticipated from an administration of of the laws for individual protection and the general public good. Special assessments, on the other hand, are made upon the assumption that a portion of the community *is to be specially and peculiarly benefited in the enhancement of the value of property peculiarly situated as regards a contemplated expenditure* of public funds; and, in addition to the general levy, they demand that special contributions, *in consideration of the special benefit*, shall be made by the person receiving it. The justice of demanding the special contribution is supposed to be evident in the fact that the persons who are to make it, while they are made to bear the cost of a public work, are at the same time to suffer no pecuniary loss thereby, their property being increased in value by the expenditure to an amount at least equal to the sum they are required to pay. This is the idea that underlies all these levies." *Cooley on Taxation*, 416, *c.* 20, § 1; *Id. 2d ed.* 606, § 1. To this we may add the declaration of the author when, speaking for the Supreme Court of Michigan in *Thomas* v. *Gain*, 35 *Mich.* 155, 162, he said: "It is generally agreed that an assessment levied *without regard to actual or probable benefits* is *unlawful, as constituting an attempt to appropriate private property to public use.*"

The court overlooked other passages in the same chapter of Cooley's Treatise on Taxation. Referring to the rule of assessment by the front foot upon property abutting on a local improvement, where no taxing district has been established over which the cost could be distributed by some standard of benefit, actual or presumptive, Cooley says: "But it has been denied, on what seems the most conclusive grounds, that this is permissible. It is not legitimate taxation because it is lacking in one of its indispensable elements. It considers each lot by itself, compelling each to bear the burden of the improvement in front of it, without reference to any contribution to be made to the improvement by any other property, and it is consequently without any apportionment. From accidental circumstances, the major part of the cost of an important public work may be expended in front of a single lot; those circumstances not at all contributing to make the improvement more valuable to the lot thus specially burdened, perhaps even having the opposite consequence. But whatever might be the result in particular cases, the fatal vice in the system is that it provides no taxing districts whatever. It is as arbitrary in principle, and would sometimes be as unequal in operation, as a regulation that a town from which a State officer chanced to be chosen should pay his salary, or that that locality in which the standing army, or any portion of it, should be stationed for the time being should be charged with its support. If one is legitimate taxation the other would be. In sidewalk cases a regulation of the kind has been held admissible, but it has been justified as a regulation of police, and is not supported on the taxing power exclusively. As has been well said, to compel individuals to contribute money or property to the use of the public, without reference to any common ratio, and without requiring the sum paid by one piece or kind of property, or by one person, to bear any relation whatever to that paid by another, is to lay a forced contribution, not a tax, within the sense of those terms as applied to the exercise of powers by any enlightened or responsible government." *Cooley on Taxation*, 453 *c.* 20, § 53; *Id. 2d ed.* 646, 647.

The author also says what I do not find in the opinion of the court in this case: "There can be no justification for any proceeding which charges the land *with an assessment greater than the benefits; it is a plain case of appropriating private property to public use without compensation.*" *Cooley on Taxation, 2d ed.* 661.

The court also cites from Dillon's Treatise on Municipal Corporations certain passages to the effect that whether the expense of making local improvements "shall be paid out of the general treasury, or be assessed upon the abutting or other property specially benefited, and if in the latter mode, whether the assessment shall be upon all property found to be benefited, or alone upon the abuttees, according to frontage or according to the area of their lots, is according to the present weight of authority considered to be a question of legislative expediency." 2 *Dillon Mun. Corp.* 4*th ed. p.* 912, § 752. These views need not be controverted in this case, and of their soundness I have no doubt when we are ascertaining the general rule to be applied in the particular classes of cases referred to by the author. But the above quotation from Dillon by no means indicates his opinion as to the application of the general rule announced by him. In the same chapter from which the court quotes, I find the following principles announced by the author as deduced from an extended reference to numerous adjudged cases: "Special benefits to the property assessed, that is, benefits received by it *in addition to those received by the community at large*, is the true *and only just foundation upon which local assessments can rest*; and *to the extent of special benefits* it is everywhere admitted that the legislature may authorize local taxes or assessments to be made." Again: "When not restrained by the Constitution of the particular State, the legislature has a discretion, commensurate with the broad domain of legislative power, in making provisions for ascertaining what property is specially benefited and how the benefits shall be apportioned. This proposition, as stated, is nowhere denied; but the adjudged cases do not agree upon the extent of legislative power. The courts which have followed the doctrine of the leading case in New York, (*People* v. *Brooklyn*, 4 *N. Y.* 419,) have asserted that the authority of the legislature in this regard is quite without limits; but the decided tendency of the later decisions, including those of the courts of New Jersey, Michigan and Pennsylvania, is to hold that the legislative power is not unlimited, and that these assessments must be apportioned by some rule capable of producing reasonable equality, and that provisions of such a nature as to make it legally impossible that the burden can be apportioned with proximate equality are arbitrary exactions and not an exercise of legislative authority." 2 *Dillon Mun. Corp. 4th ed. p.* 934, § 761. Further, the author says: "Whether it is competent for the legislature to declare that no part of the expense of a local improvement of a public nature shall be borne by a general tax, and that the whole of it shall be assessed upon the abutting property and other property in the vicinity of the improvements, thus for itself conclusively determining, not only that such property is specially benefited, but that it *is* thus benefited to the extent of the cost of the improvement, and then to provide for the apportionment of the amount by an estimate to be made by designated boards or officers, or by frontage or superficial area, is a question upon which the courts are not agreed. Almost all of the earlier cases asserted that the legislative discretion in the apportionment of public burdens extended this far, and such legislation is still upheld in most of the States. But since the period when express provisions have been made in many of the State constitutions requiring uniformity and equality of taxation, several courts of great respectability, either by force of this requirement or in the spirit of it, and perceiving that *special benefits actually received* by each parcel of contributing property, *was the only principle upon which such assessments can justly rest*, and that *any other rule is unequal, oppressive and arbitrary*, have denied the unlimited scope of legislative discretion and power, and asserted what must *upon principle be regarded as the just* and *reasonable doctrine*, that the cost of a local improvement can be assessed upon particular property *only to the extent that it is specially and peculiarly benefited; and since the excess beyond that is a benefit to the municipality at large, it must be borne by the general treasury*." 2 *Dillon Mun. Corp. 4th ed. p.* 935, § 761.

I agree with the court in saying that Cooley and Dillon are text-writers of high authority for learning and accuracy. But I cannot agree that the extracts from their Treatises found in its opinion correctly or fully state their views upon the particular question now before us.

The declaration by the court that the decision in *Norwood* v. *Baker* was placed upon the ground that the burdens imposed upon Mrs. Baker's property amounted to *confiscation* is, I submit, an inadequate view of our decision. The word "confiscation" is not to be found in the opinion in that case. The affirmance of the judgment in that case was upon the sole ground that the assessment was made under a *rule* that absolutely *excluded* any *inquiry as to special benefits.* Such a rule was held to be void because it rested upon the theory that to meet the cost of opening a street private property could be specially assessed for an amount in substantial excess of special benefits accruing to it from the improvement made in the interest of the general public.

If it may be inferred from what is said in the opinion of the court in this case that a special assessment resulting in the *confiscation* of the entire property assessed might not be sustained, I have to say that manifestly confiscation does occur when the property specially assessed is all taken to meet the cost of a public improvement supposed to be specially beneficial to the owner. So if the property is assessed beyond the special benefits accruing, there is confiscation *to the extent of such excess.* But if confiscation, in any form, will not be tolerated, what becomes of the broad declarations in the opinions in some of the cited cases to the effect that the legislature may prescribe the extent to which private property is specifically benefited by a local public improvement, and that its action in that respect cannot be questioned by the owner of the property assessed even if it appeared that the amount assessed exceeded the special benefits, or even if it appeared that the cost of the improvement exceeded the value of the property assessed? Are we to understand from the interpretation now placed upon the decision in *Norwood* v. *Baker* that the courts may, for the protection of the property owner, interfere when a legislative determination amounts to confiscation, pure and simple, but that they cannot interfere when the amount assessed is in substantial excess of the benefits received?

In my judgment, some of the cases referred to in the opinion of the court contain general declarations as to the powers of the legislature in the matter of special assessments which went far beyond what was necessary to be said in order to dispose of the respective cases. Those declarations, literally interpreted, seem to recognize the legislature in this country as possessing absolute, arbitrary power in the matter of special assessments imposed to meet the cost of a public improvement—indeed, all the powers, in the matter of taxation, that belongs to the Parliament of Great Britain. The opinions in some of these cases recall the wise observations of Chief Justice Marshall, when, speaking for this court, he said: "It is a maxim not to be disregarded that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason for the maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case to be decided, but their possible bearing on all other cases is seldom completely investigated." *Cohens* v. *Virginia*, 6 *Wheat.* 264, 399. We live under a Constitution which is the supreme law of the land. It enumerates the powers of Government, and prescribes limitations and restrictions upon legislative authority as to the property of citizens. Some of these limitations and restrictions apply equally to the Congress of the United States and to the legislatures of the States. If it be true that the only ground upon which a special assessment can be legally imposed upon particular private property to meet the cost of a public improvement is that such property receives, or may reasonably be held to receive, special benefits not shared by the general public—and no one, I take it, will dispute the soundness of that principle—and if it be true that the property cannot be made to bear a proportion of such costs in substantial excess of special benefits, it necessarily follows that the owner of the property is entitled to protection against any legislative rule or requirement that puts upon his property a burden greater than can be lawfully imposed upon it. How can he obtain such protection except through the courts? To say that he cannot do so is to say that the legislature possesses an absolute unlimited power over rights of property which is inconsistent with the supreme law of the land. Is it to become a canon of constitutional construction that the courts may interfere when the legislature authorizes a special assessment that will amount to the confiscation of the entire property assessed, but will not interfere when the confiscation is only to a limited, although a material, extent? In other words, is there to be a difference, so far as the powers of the courts are concerned, between confiscation, under the guise of taxation, of the entire property of the citizen and confiscation of only a part of it?

I have spoken of special assessments where the amount assessed was in substantial excess of special benefits. The words "substantial excess" have been used because, in the language of this court in *Norwood* v. *Baker*, already cited, exact equality of taxation is not always attainable, and for that reason the excess of cost over special benefits, unless it be of a substantial character, ought not to be regarded by a court of equity when its aid is invoked to restrain the enforcement of a special assessment. I do not doubt—indeed, the opinion in *Norwood* v. *Baker* concedes—that the legislature has a wide discretion in cases of special assessments to meet the cost of improving or opening public highways. But I deny that the owner of abutting property can be precluded from showing that the amount assessed upon him is in substantial excess of special benefits accruing to his property. To the extent of such excess the burden should be borne by the community for whose benefit the improvement is made. I entirely concur in the views of Church, C. J., as expressed in *Guest* v. *Brooklyn*, 69 *N. Y.* 506. He said: "The right to make a public street is based upon public necessity, and the public should pay for it. To force an expensive improvement [against the consent of the owners, or a majority of them] upon a few property owners against their consent, and compel them to pay the entire expense, under the delusive pretense of a corresponding specific benefit conferred upon their property, is a species of despotism that ought not to be perpetuated under a Government which claims to protect property equally with life and liberty. Besides its manifest injustice, it deprives the citizen practically of the principal protection [aside from constitutional restraints] against unjust taxation, viz., the responsibility of the representative for his acts to his constituents. As respects general taxation where all are equally affected, this operates, but it has no beneficial application in preventing local taxation for public improvements. The majority are never backward in consenting to, or even demanding, improvements which they may enjoy without expense to themselves." 2 *Dillon's Mun. Corp.* 934, *4th ed. note* 1.

At the same time this case was determined the court announced its judgment in *Wight* v. *Davidson*, on appeal from the Court of Appeals of the District of Columbia. In its opinion in that case it makes some reference to *Norwood* v. *Baker* to which it is appropriate to refer in this opinion. The court, in *Wight* v. *Davidson*, says: "There [in *Norwood* v. *Baker*] the question was as to the validity of a village ordinance, which imposed the entire cost and expenses of opening a street, irrespective of the question whether the property was benefited by the opening of the street. The legislature of the State had not defined or designated the abutting property as benefited by the improvement, nor had the village authorities made any inquiry into the question of benefits. There having been no legislative determination as to what lands were benefited, no inquiry instituted by the village councils, and no opportunity afforded to the abutting owner to be heard on that subject, this court held that the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, *to the extent of such excess*, a taking, under the guise of taxation, of private property for public use without compensation, and accordingly affirmed the decree of the Circuit Court of the United States, which, while preventing the enforcement of the particular assessment in question, left the village free to make a new assessment upon the plaintiff's abutting property for so much of the expense of opening the street as would be found, upon due and proper inquiry, to be equal to the special benefits accruing to the property." This language implies that the assessment in *Norwood* v. *Baker* was without legislative sanction and hence the judgment rendered by this court; whereas, it distinctly and unmistakably appears from the opinion in that case that what the village of Norwood did was under a legislative enactment authorizing it to open the street there in question and assess the cost upon the abutting property, according to its frontage, without regard to special benefits, and without any inquiry upon that subject. And it was because and only because of this *rule* established by the legislature that the court held the assessment invalid. I submit that this case cannot be distinguished from *Norwood* v. *Baker* upon the ground that the village of Norwood proceeded without legislative sanction.

In my opinion the judgment in the present case should he reversed upon the ground that the assessment in question was made under a statutory *rule* excluding all inquiry as to special benefits and requiring the property abutting on the avenue in question to meet the entire cost of paving it, even if such cost was in substantial excess of the special benefits accruing to it; leaving Kansas City to obtain authority to make a new assessment upon the abutting property for so much of the cost of paving as may be found upon due inquiry to be not in excess of the special benefits accruing to such property. Any other judgment will, I think, involve a grave departure from the principles that protect private property against arbitrary legislative power exerted under the guise of taxation.

True copy.

Test:

Clerk Supreme Court, U. S.